TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

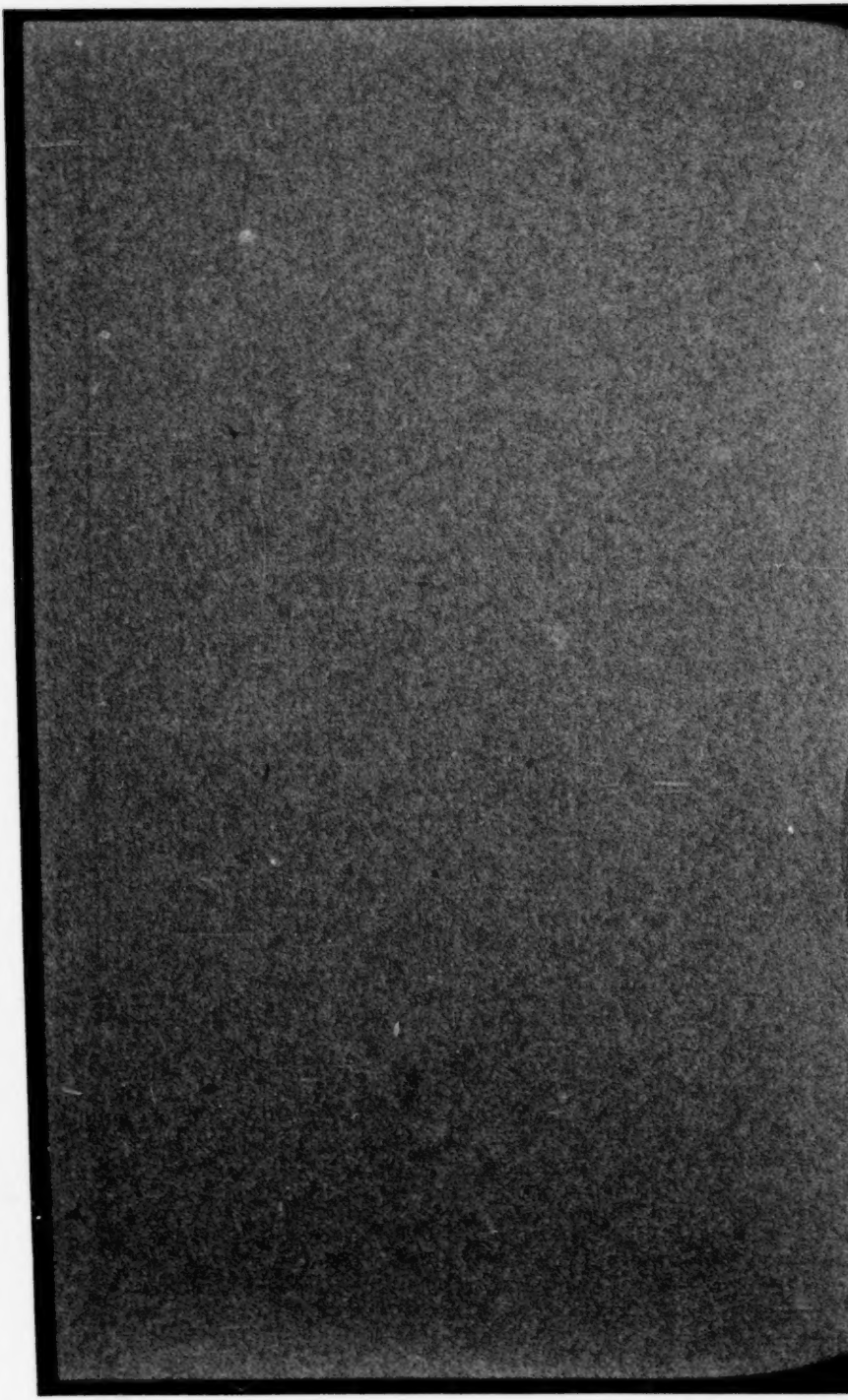
No. [redacted]188

TAUSIG-SCOTT-KITTERLEIN CO., INC., PETITIONER,

vs.

DAVID S. FOX, REGINALD P. ROYS, AND EUGENE A. BENJAMIN, TRUSTEES IN LIQUIDATION OF COTTON MERCURY CO., INC., RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.



(29,331)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 781.

TAUBEL-SCOTT-KITZMILLER CO., INC., PETITIONER,

vs.

DAVID J. FOX, REGINALD P. BOYD, AND EUGENE S. BENJAMIN, TRUSTEES IN BANKRUPTCY OF COWEN HOSIERY CO., INC., BANKRUPT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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1 **UNITED STATES CIRCUIT COURT OF APPEALS HELD IN AND FOR THE SECOND CIRCUIT.**

In the Matter of COWEN HOSIERY COMPANY, INC., Bankrupt.

Petition to Revise.

To the Honorable Circuit Court of Appeals of the United States Held in and for the Second Circuit:

The petition of David J. Fox, Reginald P. Boyd and Eugene S. Benjamin, respectfully represents:

That on the 25th day of August, 1922, an order of adjudication was duly entered in the United States District Court for the Southern District of New York, adjudicating the Cowen Hosiery Company, Inc., the bankrupt above named a bankrupt upon its voluntary petition, and thereafter such proceedings were had that on the 12th day of September, 1922, at the first meeting of creditors duly
2 had, your petitioners were duly elected Trustees in bankruptcy of the bankrupt above named, and they duly qualified as such, and ever since have been, and now are acting as such Trustees.

That on the 15th day of August, 1922, ten days before the filing of the voluntary petition herein by the bankrupt above named, Taubel-Scott-Kitzmiller Co., Inc., (hereinafter styled the judgment creditor) entered a judgment on default against the bankrupt above named in the Supreme Court, New York County, for the sum of $39,366.55, and on the same day caused an execution to be issued on said judgment to the Sheriff of the County of New York, who levied on some of the property and assets of the bankrupt at 114 East 23rd Street, Borough of Manhattan, City of New York, but the Sheriff did not remove any of the said property, or take any of it into his physical custody.

Your petitioners state, upon their information and belief, that as a result of careful investigations made by them, that the bankrupt was insolvent on August 15th, 1922.

On September 15th, 1922, your petitioners obtained from Seaman Miller, Esq., the Referee in bankruptcy in charge of this matter, an order directing the judgment creditor to show cause before him on September 18th, 1922, at four o'clock in the afternoon, why said judgment and why the levy upon the execution issued thereunder should not be deemed null and void, and why the property affected by the levy and judgment should not be deemed
3 wholly discharged and released from the same, and why it should not pass to the Trustees as a part of the estate of the bankrupt.

On September 16th, 1922, the judgment creditor obtained from Honorable Julian W. Mack, Circuit Judge, sitting in the District

Court of the United States for the Southern District of New York, an order requiring your petitioner to show cause before him on September 18th, 1922, at ten-thirty o'clock in the forenoon, why an order should not be made to vacate the order to show cause granted by Seaman Miller, Esq., Referee, on September 15th, 1922, and why other relief should not be granted. That said motion came on to be argued, and on the 19th day of September, 1922, Judge Mack made an order on the application of the judgment creditor, vacating and setting aside the order to show cause made by the Referee in bankruptcy, upon the ground that he was without jurisdiction to make the same, inasmuch as the rights of the judgment creditor cannot be determined in a summary proceeding, but only by a plenary suit, and the said order vacated and set aside various stays heretofore granted in the court below, restraining the Sheriff from disposing of the property theretofore levied upon by him, unless the Trustees shall begin a plenary suit against the judgment creditor and the Sheriff of New York County, to release the property of the bankrupt from the levy of the Sheriff's execution under the said judgment.

Your petitioners respectfully represent that manifest error was committed by Judge Mack in the court below; that the order
4 entered on the 19th day of September, 1922, is erroneous in that the District Court should not have restrained the Referee from proceeding summarily to ascertain whether or not the judgment creditor had a real or only colorable adverse claim to the property affected by the execution issued upon the judgment, and was also erroneous in determining as a matter of law, that the rights of the judgment creditor under its judgment and execution could only be decided by a plenary suit. Manifest error was also committed in the order in directing that various stays against the Sheriff of the County of New York in selling the property under the execution be vacated, unless a plenary suit is brought by the Trustees against the judgment creditor and the Sheriff. Manifest error was also committed by providing in the order that upon any sale of the property affected by the levy, the proceeds thereof shall be forthwith paid to the Sheriff of the County of New York.

Wherefore, your petitioners pray that this Court review the said order of September 19th, 1922, and that it may be revised and reversed in matters of law, and that such directions be made by this Court to the Court below as are consistent with the law governing this matter.

And your petitioners will ever pray, etc.

Dated, New York, September 20th, 1922. David J. Fox, Reginald P. Boyd, Eugene S. Benjamin, Petitioners.

5 STATE AND COUNTY OF NEW YORK, *ss:*

David J. Fox, being duly sworn, deposes and says that he is one of the petitioners herein; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own

knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true. David J. Fox.

Sworn to before me this 20th day of September, 1922. Arthur R. Brice, Notary Public, New York County.

6 District Court of the United States for the Southern District of New York.

[Title omitted.]

Order to Show Cause.

Upon reading and filing the annexed petition of Taubel-Scott-Kitzmiller Co., Inc., and upon the two involuntary petitions heretofore filed by Malcolm C. Hutchison against the above named bankrupt, and upon the voluntary petition in bankruptcy herein and the schedules thereto annexed, and upon the order to show cause dated August 16th, 1922, made by Hon. Julius M. Mayer and the petition thereto annexed, and the order dated August 18, 1922, entered thereon and the order of this Court entered September 6, 1922, vacating the same, and the consents thereto annexed, and upon the order to show cause made on August 29, 1922, by Hon. Julian W. Mack herein and the petition thereto annexed, and the affidavits submitted in opposition thereto, and upon the letter of Olcott, Bonynge, McManus & Ernst dated September 8, 1922, addressed to Hon. Julian
7 W. Mack, withdrawing said motion, upon the order to show cause herein made by Hon. Seaman Miller, Referee, on September 15, 1922, and the petition of the Trustees herein thereto annexed, verified September 14, 1922, and upon the order of this Court, Hon. Julian W. Mack presiding, made and entered August 25, 1922, and the petition of Elias D. Cowen verified August 25, 1922, thereto annexed, and the order of this Court, Hon. Julian W. Mack presiding, without date, but entered in the office of the Clerk of this Court on September 1, 1922.

I do hereby order and direct David J. Fox, Reginald P. Boyd, and Eugene S. Benjamin, the Trustees herein, or their attorneys, to show cause before me, at my chambers, 1 Woolworth Building, in the Borough of Manhattan, City of New York, on the 18th day of September, 1922, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, why an order should not be made and entered herein vacating and setting aside the said order of this Court, Hon. Julian W. Mack presiding, dated August 25th, 1922, and the order without date made by this Court, Hon. Julian W. Mack presiding, and filed in the office of the Clerk of this Court on September 1, 1922, unless the Trustees in bankruptcy elected herein shall, within ten days from and after the date of said order, institute and thereafter diligently prosecute an action against Taubel-Scott-Kitzmiller Co., Inc., and the Sheriff of New York County, for

the purpose of vacating and setting aside the lien of the judg-
8 ment entered in the office of the Clerk of the County of New York in favor of the said Taubel-Scott-Kitzmiller Co., Inc., and against the above named bankrupt on August 15, 1922, and of the execution thereof levied by the Sheriff of the County of New York on the goods, chattels and assets of the bankrupt on August 15, 1922; and why said order to show cause made by Hon. Seaman Miller should not be vacated;

And sufficient reason appearing to me therefor

I do hereby order and direct that service of this order and of the annexed petition of the said Taubel-Scott-Kitzmiller Co., Inc., upon the attorneys for the said Trustees, at any time before noon on September 16, 1922, shall be deemed good and sufficient service hereof.

Dated, New York, September 16, 1922. J. W. Mack, Judge.

9 District Court of the United States for the Southern District of New York.

[Title omitted.]

Petition of Taubel-Scott-Kitzmiller Company, Inc.

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The petition of Taubel-Scott-Kitzmiller Co., Inc., respectfully shows:

I. Your petitioner is and at all the times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey.

II. Your petitioner is a judgment creditor of the above named bankrupt. On August 15, 1922, your petitioner caused to be entered in the office of the Clerk of the County of New York a judgment in the sum of $39,366.55 in an action for goods sold, delivered and accepted. On the same day your petitioner caused an
10 execution upon said judgment to be issued out of the office of the Clerk of the Supreme Court, New York County, and to be delivered to the Sheriff of the County of New York, who thereupon levied said execution upon the goods, wares and merchandise of the above named bankrupt at 114-116 East 23rd Street, Borough of Manhattan, City of New York. Said Sheriff thereupon placed his deputies and custodians in possession of said goods, wares and merchandise and is now, and ever since August 15, 1922, has been, in possession of the same under the execution levied as aforesaid.

III. Thereafter and on the morning of August 16, 1922, one Malcolm C. Hutchison, assignee of the claim of the Irving National Bank against the above named bankrupt, filed an involuntary petition in bankruptcy praying that the above named bankrupt be adjudicated a bankrupt and alleging the bankrupt's insolvency and the granting of preferences within the period of four months. Upon the

same day said Hutchison made a motion returnable before Judge Mayer in Chambers for an order vacating and setting aside the execution levied by the Sheriff and the lien created thereby. Judge Mayer granted said motion, the order granting said motion being entered on August 18th, 1922. Your petitioner filed its verified answer to the said involuntary petition, your petitioner alleging that the above named bankrupt was upon the date of said petition, namely on August 16, 1922, solvent. The Sheriff of New York County was
11 made a party to the proceedings before Judge Mayer for a stay and, feeling aggrieved thereby, applied to Judge Henry Wade Rogers of the Circuit Court of Appeals of this Circuit for a stay pending the decision upon the proceedings of the Sheriff to have the said order of Judge Mayer revised. Since that time the said Hutchison and the bankrupt and the other parties appearing at the argument before Judge Mayer have consented that Judge Mayer's order be vacated and set aside.

IV. Thereafter the petitioning creditor and those acting with him, apparently convinced that they could not prove the insolvency of the bankrupt, filed a second involuntary petition in bankruptcy on the 22nd day of August, 1922. To this second involuntary petition the above named bankrupt appended its consent to an adjudication and an admission of its inability to pay its debts. To this involuntary petition again your petitioner filed its verified answer in which it traversed the allegations of insolvency and alleged that the said alleged bankrupt was on the date of said petition, that is to say on August 22, 1922, solvent. In the meantime your petitioner had obtained an order under Section 21A of the Bankruptcy Act to examine the said bankrupt and others concerning the property and conduct of the bankrupt.

V. Again apparently seeing that the determination of the bankrupt and the creditors acting in collusion with the bankrupt
12 would be unable to encompass the adjudication so much desired, the alleged bankrupt on August 25, 1922, filed a voluntary petition in bankruptcy, which automatically resulted in an adjudication. Thereafter, and on August 25, 1922, the said bankrupt upon its petition obtained an order to be entered by this Court, Hon. Julian W. Mack presiding, which provided as follows:

"Ordered that the Sheriff of the County of New York, his deputies, agents, and servants, the Taubel-Scott-Kitzmiller Co., Inc., its attorneys, agents, servants and employees, be and they are hereby restrained from proceeding under a judgment entered in favor of Taubel-Scott-Kitzmiller Co., Inc., on the 15th day of August, 1922, and the execution issued thereunder to the Sheriff of the County of New York:"

This order is one of the orders which your petitioner now desires to be vacated unless the Trustees commence a plenary suit to vacate the lien obtained by your petitioner. It is noteworthy that in the form of order submitted by the bankrupt to Judge Mack there was a pro-

vision requiring the Sheriff to surrender and relinquish the assets of the bankrupt but that Judge Mack quite properly struck this provision from the said order.

VI. Thereafter your petitioner, through its attorney, subjected the said bankrupt to an examination under the said order above
13 referred to, directing the examination under Section 21A of the United States Bankruptcy Act. Pending the said examination the petitioning creditors made a new motion before this Court for an order ousting the Sheriff of the County of New York from possession of the goods, wares and merchandise of the bankrupt and asking that the question of the solvency of the said bankrupt should be referred to a Referee for determination and report. When this motion came on to be heard the attorney for the bankrupt stated that the Sheriff of the County of New York had threatened to remove certain of the assets of the bankrupt from the premises at 114 East 23rd Street, New York City, and Judge Mack stated from the Bench that he would enter an order staying the Sheriff from thus removing the property, and your petitioner's attorney stated in open Court that he had no objection to said stay. Judge Mack thereupon entered the order without date but which was filed in the office of the Clerk of this Court on September 1, 1922, which provided as follows:

"Ordered: 1.—That the Sheriff of the County of New York, his deputies, agents, servants or employees be and they severally are restrained and enjoined from removing from the premises of the bankrupt any of the property, assets and effects of the bankrupt estate, and the said sheriff, his deputies, agents, servants or employees be and they hereby are further restrained from in any way interfering with any of the property, assets and effects, except that
14 they may continue in possession thereof under the levy heretofore made, and for no other purpose and it is further

Ordered: 2.—That the Taubel-Scott-Kitzmiller Co., Inc., its attorneys, agents, servants or employees be and they are hereby restrained from taking any proceedings under the judgment entered in favor of the Taubel-Scott-Kitzmiller Co., Inc., against the bankrupt herein on the 15th day of August, 1922, and the execution issued thereunder to the Sheriff of the County of New York, until the further order of this Court,"

and which is the second order which your petitioner now desires vacated, unless the Trustees promptly institute a plenary suit to determine your petitioner's right to the said levy. The petitioning creditors did not thereupon press the motion to oust the Sheriff but argued strenuously in favor of that portion of the motion referring to a Referee the question of solvency. Before Judge Mack had determined that question, however, and on September 8, 1922, Messrs. Olcott, Bonynge, McManus & Ernest, attorneys for the petitioning creditor, wrote a letter to Judge Mack, of which the annexed, Marked Exhibit A, is a copy, withdrawing said motion.

VII. Thereafter, and on September 12, 1922, at one o'clock in the afternoon, the first meeting of creditors of the above named
15 bankrupt was held at the office of Hon. Seaman Miller, Referee, and David J. Fox, Reginald P. Boyd and Eugene S. Benjamin were duly elected Trustees in bankruptcy of the above named bankrupt and your petitioner is informed and believes have qualified and are now acting as such trustees.

VIII. Thereafter and on September 15, 1922, the said Trustees obtained from Hon. Seaman Miller an order to show cause upon their petition, returnable on September 18, 1922, before Hon. Seaman Miller, for an order annulling and voiding the judgment obtained by your petitioner and the execution levied thereunder and discharging and releasing the property of the bankrupt from the levy of said execution. Your petitioner is annexing hereto and marking Exhibit A, and making a part of this petition, the said order to show cause dated September 15, 1922, and the petition of said Trustees verified September 14, 1922, thereto annexed.

IX. Your petitioner is informed by his attorney, Herman Goldman, and verily believes it to be true that the issue as to whether your petitioner's lien under said levy of execution is voidable is a question over which the said Referee in bankruptcy has no jurisdiction and which cannot be determined in any summary manner, but that under the decisions of the Courts of Bankruptcy, said question can only be determined in a plenary suit instituted by the Trustees to which not alone your petitioner, but the Sheriff of the County of
16 New York as well, must be made parties. Your petitioner is informed and verily believes it to be true that on August 15, 1922, the date of the entry of your petitioner's judgment and the levy of the execution thereunder, the above named bankrupt was solvent. The sources of your petitioner's information and the ground of your petitioner's belief are as follows: On August 8, 1922, your petitioner is informed by its aforesaid attorney, and verily believes it to be true, at the office of Henry Fluegelman, who was then the attorney for the above named bankrupt, said Fluegelman and one Henry F. Blum, also an attorney speaking on behalf of the Cowen Hosiery Co., Inc., now bankrupt, and in the presence of William Cowen, the President of said company, and Elias D. Cowen, its Secretary and Treasurer, stated that the said Cowen Hosiery Co., Inc., was solvent and that its assets exceeded its liabilities by approximately $60,000. A further source of your petitioner's information and a further ground for its belief, are the schedules which are annexed to the voluntary petition in bankruptcy. Although these schedules are so drawn as upon a first glance to show an insolvency (the assets being shown as $238,989.48 and the liabilities $284,669.41) nevertheless upon slight analysis it is obvious that there are clear assets, as shown by the schedules, to the extent of $98,787.83 in excess of the said sum of $238,989.48, showing clear solvency on the part of the bankrupt. Moreover, Elias D. Cowen, the Treasurer of the bankrupt, in his examination under 21A testified that
17 in scheduling the merchandise on hand at $125,000, he had been in error and that the figure should have been in the

neighborhood of $210,000. Therefore, there is an additional element of solvency to the extent of $85,000. In addition, your petitioner is advised by Herman Goldman its attorney that the said examination revealed liabilities on the part of the officers of the bankrupt to the bankrupt in very large sums. The result is that all of the information available to your petitioner, not alone induces the belief, but actually the conviction, amounting to knowledge, that the said bankrupt was solvent not alone on August 15, 1922, the date when your petitioner's judgment was entered and the execution thereon levied, but that said bankrupt is today solvent and capable of paying its debts to its creditors in full.

X. You petitioner intends in good faith to defend any suit which the trustees in bankruptcy herein may institute against your petitioner for the purpose of determining the question of the solvency of the alleged bankrupt upon said August 15, 1922, and desires that said proceeding be instituted at the earliest possible moment and prosecuted with the utmost diligence and dispatch. Your petitioner prays that the said Trustees should be required to institute such proceedings within ten days after the determination of this motion and should be required to prosecute the said proceedings with all diligence and dispatch and your petitioner prays to this Court that unless the said Trustees do so institute said suit and do so prosecute it,
18 that your petitioner be no longer defeated and delayed in realization of the lien which it has caused to be fastened upon the property of the above bankrupt.

XI. Your petitioner believes that the said proceeding sought to be brought on by the order to show cause issued by said Referee Miller on September 15th has been instituted only for the purpose of harassing and annoying your petitioner and with a full realization that the said Referee was utterly without jurisdiction in the premises and that in no event could either the Referee or any other tribunal dispose of your petitioner's lien in a summary manner or otherwise than by a plenary suit and your petitioner therefore prays that said proceedings be stayed pending the determination by this Honorable Court of the questions presented by this motion.

Wherefore, your petitioner prays that the order to show cause to which this petition is annexed be made, and that the relief therein referred to be granted, for all of which no other or previous application has been made to this or any other Court or Judge, except that the said Hon. Seaman Miller was requested to vacate his said order to show cause, which he declined to do.

Dated, New York, September 16, 1922. Taubell-Scott-Kitzmiller Co., Inc. By Thomas R. Scott, Secretary. Herman Gold-
19 man, Attorney for Petitioner, Office & P. O. Address, 120 Broadway, Borough of Manhattan, City of New York.

STATE OF NEW YORK,
County of New York, ss:

Thomas R. Scott, being duly sworn, deposes and says: that he is the Secretary of the petitioner herein; that he has read the forego-

ing petition and knows the contents thereof and that the same is true to his own knowledge, except as to those matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

This verification is not made by the petitioner because the petitioner is a corporation and deponent is an officer thereof, to wit, its secretary. Thomas R. Scott.

Sworn to before me this 16th day of September, 1922. Harry G. Liese, Notary Public, Kings County, Kings County No. 175. Kings Co. Reg. No. 3000. Certificate filed in New York County No. 11. New York County Register's No. 3006. My Commission expires March 30, 1923.

20 **Exhibit A to Petition of Taubel-Scott-Kitzmiller Company.**

Olcott, Bonynge, McManus & Ernst,

170 Broadway, New York, N. Y.

September 8, 1922.

Hon. Julian W. Mack, U. S. District Judge, Post Office Building, New York City.

Re Cowen Hosiery Co., Inc.

DEAR JUDGE MACK:

On August 31, 1922, there was argued before you in the above matter (on an Order to Show Cause previously made by you) a motion, having for its purpose (*a*) to restrain the Sheriff from committing certain acts, and (*b*) to refer the question of the solvency of the bankrupt to a Special Master.

As to the first part of the relief prayed (*a*) an Order was made, but the second part of the relief prayed (*b*) is still pending and undetermined before your Honor. This letter is written to request that we be permitted to withdraw that part of the motion still pending and undetermined. Respectfully yours, Olcott, Bonynge, McManus & Ernst. WEE/B.

P. S.—Copy of this letter has been sent to Mr. Herman Goldman, attorney for the objectant creditor, and to Mr. David Kahn, attorney for the bankrupt. W. E. E.

21 United States District Court, Southern District of New York.
In Bankruptcy.

In the Matter of COWEN HOSIERY COMPANY, INC., Bankrupt.

Exhibit B to Petition of Taubel-Scott-Kitzmiller Company.

Upon the annexed petition of the Trustees herein, duly verified, and upon the order of adjudication entered herein, and upon all proceedings, had, it is, on motion of Olcott, Bonynge, McManus & Ernst, attorneys for the Trustees,

Ordered, that Taubel-Scott-Kitzmiller Co. appear before me at my office, 2 Rector Street, in the Borough of Manhattan, City of New York, on the 18th day of September, 1922, at 4 o'clock in the afternoon, and then and there show cause why the judgment entered in the Supreme Court, New York County, in favor of Taubel-Scott-Kitzmiller Co., against the bankrupt, on August 15th, 1922, for $59,-
366.55, and the levy upon the execution issued thereunder,
22 should not be deemed null and void, and why the property affected by the levy and judgment shall not be deemed wholly discharged and released from the same, and why the same shall not pass to the Trustees as a part of the estate of the bankrupt, and why such other and further relief as to the Court may seem just and proper in the premises shall not be granted.

Service of this order to show cause, and the accompanying petition, if made on the attorneys for Taubell-Scott-Kitzmiller Co. on or before September 16th, 1922, shall be deemed good and sufficient service.

Dated, New York, September 15th, 1922. (Sgd.) Seaman Miller, Referee in Bankruptcy.

23 United States District Court, Southern District of New York.

[Title omitted.]

Petition of David J. Fox.

To the Honorable District Court of the United States for the Southern District of New York:

The petition of David J. Fox, Reginald P. Boyd and Eugene S Benjamin respectfully represents:

That on the 25th day of August, 1922, the bankrupt above named was duly adjudicated a bankrupt by an order of adjudication duly entered in this Court. That thereafter, a first meeting of creditors was held on the 12th day of September, 1922, and at that time your petitioners were duly elected Trustees, their election was duly approved, and they thereafter duly qualified, and ever since have been, and now are acting as such Trustees.

That prior to the filing of the petition herein by the bank-
24 rupt, Taubell-Scott-Kitzmiller Co., a corporation organized and existing under the laws of the State of New York, a creditor of the bankrupt herein, entered a judgment in the Supreme Court, New York County, on August 15th, 1922, against the bankrupt, in the sum of $39,366.55, and caused an execution to be issued on said judgment to the Sheriff of the County of New York, who levied upon the property and assets of the bankrupt at 114 East 23rd Street, in the Borough of Manhattan, City of New York, but said Sheriff did not remove any of said property, or take any of it into his physical custody, and that said property was in the possession of the bankrupt at the date of the adjudication, and is now in the possession of your petitioners as Trustees.

That the date of the enry of the said judgment and of the levy under the execution was within four months of the date of the adjudication herein, and at a time when the bankrupt was insolvent.

Your petitioners state that the bankrupt was insolvent on August 15th, 1922, to their knowledge, by investigations made by the affairs, assets and liabilities of the bankrupt at and as of that time.

That under Section 67 of the Bankruptcy Act, all levies, judgments and other liens obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the prop-
25 erty affected by the levy and judgment shall be deemed wholly discharged and released from the same, and shall pass to the Trustees as a part of the estate of the bankrupt. Your petitioners therefore allege that the judgment obtained on August 15th, 1922, and the levy made thereunder, shall be deemed null and void, and any property affected thereby be wholly discharged and released from the same.

Your petitioners therefore pray that an order be made, directing the Taubell-Scott-Kitzmiller Co. to appear and show cause why such an order should not be made accordingly. Your petitioners ask for an order to show cause, instead of serving the usual notice of motion, for the reason that the Sheriff has placed a custodian in the place of business of the bankrupt, and each day that the custodian remains is an added expense.

That no previous application for the relief herein prayed for has been made. Trustees of Cowen Hosiery Co., Inc., by Eugene S. Benjamin, Trustee. Dated, New York, September 14, 1922.

STATE AND COUNTY OF NEW YORK, *ss:*

Eugene S. Benjamin being duly sworn, deposes and says that he is one of the petitioners herein; that he has read the foregoing petition and knows the contents thereof; that the same is true
26 of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true. (Sgd.) Eugene S. Benjamin.

Sworn to before me this 14th day of September, 1922. George Bookstaver, Notary Public, Bronx County, No. 96.

27 **Petition of Malcolm C. Hutchison, August 16, 1922.**

To the Hon. Judges of the United States District Court for the Southern District of New York:

The petition of Malcolm C. Hutchison respectfully shows:

That Cowen Hosiery Co., Inc., a corporation organized under the laws of the State of New York has for the greater portion of six months next preceding the date of filing this petition had its principal place of business at 114 East 23rd Street, Borough of Manhattan, City of New York, in the State and District aforesaid and owes debts to the amount of One Thousand Dollars.

That your Petitioner is a creditor of said Cowen Hosiery Co., Inc., having a provable claim, amountng in the aggregate in excess of securities held by him to the sum of Five Hundred Dollars. That the nature and amount of your Petitioner's claim is as follows: Money loaned by the Irving National Bank, New York, to said Cowen Hosiery Co., Inc., in the amount of Twenty-five Thousand Dollars for which the said borrower gave its promissory note for Twenty-five Thousand Dollars representng the sum borrowed, which said promissory note has been duly transferred and assigned to your Petitioner, no part of which has been paid, and the whole amount of which is owing.

28 Your Petitioner further represents upon information and belief that said Cowen Hosiery Co., Inc., is insolvent and that within four months next preceding the date of this petition the said Cowen Hosiery Co., Inc., committed various acts of bankruptcy in that it did during the months of July and August, 1922, while insolvent, make certain transfers of its property, to wit: money, to various of its creditors with intent to prefer such creditors over its other creditors.

Upon information and belief the number of the creditors of the Cowen Hosiery Co., Inc., is less than twelve.

Upon information and belief that the liabilities of the Cowen Hosiery Co., Inc., are upwards of Two Hundred Thousand Dollars and that the value of its assets are unknown to your Petitioner but probably aggregate One Hundred and Fifty Thousand Dollars.

Wherefore your Petitioner prays that service of this Petition with a subpœna may be made upon Cowen Hosiery Co., Inc., as provided in the Acts of Congress relating to Bankruptcy and that it may be adjudged a bankrupt within the purview of said Acts. Malcolm C. Hutchison, Petitioner. Olcott, Bonynge, McManus & Ernest, Attorneys for Petitioner, 170 Broadway, Manhattan, N. Y. C.

29 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Malcolm C. Hutchison, the Petitioner above named being duly sworn, does hereby make solemn oath that the statements contained in the foregoing Petition subscribed by him are true to the best of his knowledge, information and belief. Malcolm C. Hutchison.

Sworn to before me this 16th day of August, 1922. —— ——.

30 **Petition of Malcolm C. Hutchison, August 22, 1922.**

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The petition of Malcolm C. Hutchison, respectfully represents:

That Cowen Hosiery Company, Inc., has, for the greater portion of six months next preceding the date of filing this petition, had its principal place of business at 114 East 23rd Street, Borough of Manhattan, City of New York, in the State and District aforesaid, and owes debts to the amount of $1,000.

That your petitioner is a creditor of said Cowen Hosiery Company, Inc., having a provable claim amounting, in the aggregate, in excess of securities held by him, to the sum of $500.00.

That the nature and amount of your petitioner's claim is as follows: Money loaned to Cowen Hosiery Company, Inc., in the sum of $25,000 for which said Cowen Hosiery Company, Inc., gave its promissory note in the sum of $25,000 representing the sum borrowed, which said promissory note has been duly transferred and assigned to your petitioner who is now the owner and holder thereof, no part of which has been paid, and the whole of which is due and owing.

And your petitioner further represents that the Cowen Hosiery Company, Inc., is insolvent, and that it has committed an act of bankruptcy within four months next preceding the date of this petition, in that while insolvent, on August 18th, 1922, it
31 admitted in writing its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground.

Upon information and belief, the number of the creditors of the Cowen Hosiery Company, Inc., is less than twelve.

Upon information and belief, that the liabilities of the Cowen Hosiery Company are upwards of $200,000, and that the value of its assets are unknown to your petitioner, but probably aggregate $150,000.

Wherefore, your petitioner prays that service of this petition with a subpœna may be made upon the Cowen Hosiery Company, Inc., as provided in the Acts of Congress relating to Bankruptcy, and that it may be adjudged a bankrupt within the purview of said Acts. Malcolm C. Hutchison, Petitioner. Olcott, Bonynge, McManus & Ernst, Attorneys for Petitioning Creditor, 170 Broadway, Borough of Manhattan, City of New York.

STATE AND COUNTY OF NEW YORK, *ss:*

Malcolm C. Hutchison, being duly sworn, deposes and says that he is the petitioning creditor herein; that he has read the
32 foregoing petition, and that the statements therein contained are true. Malcolm C. Hutchison.

Sworn to before me this 22 day of August, 1922. D. V. Sullivan, Notary Public. (Seal.) Bronx Co. 132, New York Co. 100. Bronx Register 231; N. Y. Reg. 4263. Term Expires March 30, 1924.

33 United States District Court, Southern District of New York.

[Title omitted.]

Confession of Inability to Pay Attached to Involuntary Petition.

The alleged bankrupt above named, hereby consents to the entry of an order of adjudication herein.

Dated, August 18th, 1922. David W. Kahn, Attorney for Alleged Bankrupt.

Cowen Hosiery Co., Inc., hereby admits its inability to pay its debts and consents to be adjudged a bankrupt upon that ground.

Dated, August 18th, 1922. Cowen Hosiery Co., Inc., by Elias D. Cowen, Secretary and Treasurer. (Seal.)

34 CITY AND COUNTY OF NEW YORK, *ss:*

On the 18th day of August, 1922, before me came Elias D. Cowen, to me known, who, being by me duly sworn, did depose and say that he resides in Far Rockaway, Borough of Queens, City of New York; that he is the Secretary and Treasurer of Cowen Hosiery Co., Inc., the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order. Eleanor Doblinn, Notary Public, Kings County. Kings Co. Clerk's No. 168. Reg. No. 4189.

35 In United States District Court.

Petition of Cowen Hosiery Company, Inc.

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The petition of Cowen Hosiery Co., Inc., respectfully represents:

That it is a corporation duly created and existing under and by virtue of the laws of the State of New York, and is not a Municipal

Railroad or Banking Corporation, but engaged in the buying and selling of hosiery.

That it has had its principal place of business and has carried on its principal business for the greater portion of six months next immediately preceding the filing of this petition, at 114 East 23rd Street, in the City of New York, within said Judicial District.

That it owes debts which it is unable to pay in full. That it is willing to surrender all of its property for the benefit of its creditors, except such as is exempt by law, and desires to obtain the benefit of the Acts of Congress relating to Bankruptcy.

That the Schedules hereto annexed marked A and verified by your petitioner's oath contains a full and true statement of all its debts and the names and places of residence of its creditors, and such further statements concerning said debts required by the provisions of said Acts.

That the schedule hereto annexed, marked B, and verified by your petitioner's oath, contains an accurate inventory of all its property, both real and personal, and such further statements concerning said property as are required by the provisions of said Acts.

36 That at a meeting of the Board of Directors of your petitioner, at which all of the directors were present, a resolution was adopted to the effect that the corporation petition the United States District Court for the Southern District of New York, for its adjudication as a Bankrupt and for the treasurer to sign said petition and schedules.

Wherefore, your petitioner prays that it may be adjudged by the court to be a bankrupt within the purview of said Act. Cowen Hosiery Co., Inc., by Elias D. Cowen, Treas., Petitioner. (Corp. Seal.) David W. Kahn, Attorney for Petitioner.

UNITED STATES OF AMERICA,
Southern District of New York,
County of New York, ss:

I, Elias D. Cowen, the treasurer of the petitioning corporation mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief. Elias D. Cowen.

Subscribed and sworn to before me this 24th day of August, 1922. Edith Kahn, Notary Public, New York County.

37 **Schedule A to Petition.**

Statement of All Debts of Bankrupt.

Statement of All Creditors Who are to be Paid in Full or to Whom Priority is Secured by Law.

Claims which have Priority.

	Amount.
1. Taxes and Debts due and owing the United States—Disputed	$246.00
2. Taxes due and owing to the State of — or to any County, District or Municipality thereof	None.
3. Wages due workmen, Clerks or Servants, to an amount not exceeding $300 each, earned within three months before filing the petition	None.
4. Other debts having priority by law	None.
Total	$246.00

Cowen Hosiery Co., Inc., Petitioner, By Elias D. Cowen, Treasurer.

This Schedule must be executed in triplicate.

38 Schedule (A) 2.

Creditors Holding Securities.

(N. B.—Particulars of Securities held, with dates of same and when they were given, to be stated under the names of the several Creditors, and also particulars concerning each Debt, as required by the Acts of Congress relating to Bankruptcy, whether contracted as partner or joint-contractor with any other person; and if so, with whom.)

	Value of securities.	Amount of debts.
Irving National Bank, New York, Balance	$2,028.70	$40,000.00
Columbia Bank, New York	8,391.65	50,000.00
First National Bank, Chicago	10,867.48	75,000.00
Manufacturer's Finance Company, Baltimore, Md.—Approximately	75,000.00	37,049.95
Total		$202,049.95

Cowen Hosiery Co., Inc., Petitioner, By Elias D. Cowen, Treasurer.

This Schedule must be executed in triplicate.

39 SCHEDULE A (3).

Creditors Whose Claims Are Unsecured.

(N. B.—When the name and residence (or either) of any Drawer, Maker, Endorser or Holder of any Bill or Note, etc., are unknown, the facts must be stated; and also the name and residence of the last Holder known to the Debtor. The Debt, due to each Creditor must be stated in full, and any claim by way of Set-off stated in the Schedule of Property.)

	Amount.
Charles Chipman Sons, 349 Broadway, N. Y.....	$7,500.00
Hinchman Vezin & Co., 349 Broadway, N. Y.....	6,720.00
Hollen Mfg. Co., 683 Broadway, N. Y.....	901.00
Hancock Knitting Mills, 41 Union Sq., West N. Y.....	3,045.00
Nalde & Harste, Reading, Pa.....	19,365.00
Taubel-Scott-Kitzmiller Co., Riverside, N. J.....	39,366.55
Unrivaled Hosiery Mills, 356 Broadway, N. Y.....	1,137.50
Union Mfg. Co., Frederick, Md.....	270.00
Total	$78,305.05

Insert in all cases, ledger page, names of creditors and their residence if known or unknown, so state, when and where debt was contracted; nature and consideration of the Debt, and whether any Judgment, Bond Bill of Exchange, Promissory Note, &c. and
40 whether contracted as partner or joint contractor, or with any other person; and if so, with whom. Cowen Hosiery Co., Inc., Petitioner, By Elias D. Cowen, Treasurer.

This Schedule must be executed in triplicate.

SCHEDULE A (4).

Liabilities on Notes or Bills Discounted which Ought to be Paid by Drawers, Makers, Acceptors, or Endorsers.

(N. B.—The dates of the Notes or Bills, and when due, with the Names, Residences, and the Business or Occupation of the Drawers, Makers or Acceptors thereof are to be set forth under the Names of the holders. If the Names of the Holders are not known, the Name of the last Holder known to the Debtor shall be stated and his business and place of residence. The same particulars as to Notes or Bills on which the Debtor is liable as Endorser.)

	Amount.
Approximately	$4,068.41
Total	$4,068.41

Cowen Hosiery Co., Inc., Petitioner, By Elias D. Cowen, Treasurer.

This Schedule must be executed in triplicate.

41 SCHEDULE A (5).

Accommodation Paper.

(N. B.—The Dates of the Notes or Bills, and when due, with the Names and Residences of the Drawers, Makers, or Acceptors thereof, are to be set forth under the Names of the holders; if the bankrupt be liable as Drawer, Maker, Acceptor or Endorser thereof, it is to be stated accordingly. If the names of the Holders are not known, the name of the last Holder known to the Debtor should be stated, with his residence. The same particulars as to other commercial paper.) —None.

Insert in all cases, ledger page, names of holders, residence, if known, if unknown, so state; names of and residences of persons accommodated; place where contracted; whether liability was contracted as partner or joint contractor, or with any other person, and if so with whom. Cowen Hosiery Co., Inc., Petitioner, By Elias D. Cowen, Treasurer.

This Schedule must be executed in triplicate.

(N. B.—Oath as prescribed to Schedule A, to be annexed to this sheet.)

N. B.—The following form of Oath to Schedule A of the Petition by Debtor is prescribed and is to be annexed to the same:

42 *Oath to Schedule A.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

On this 24th day of August, A. D. 1922, before me personally came Elias D. Cowen, treasurer of the corporation mentioned in and who subscribed to the foregoing Schedule, and who being by me first duly sworn did declare the said Schedule to be a statement of all its debts, in accordance with the Acts of Congress relating to Bankruptcy.

Subscribed and sworn to before me this 24th day of August, A. D. 1922. Edith Kahn, Notary Public, New York County. (Official Character.)

This oath may be administered by officers authorized to administer oaths in proceedings before Courts in the United States or under the laws of the State where the same are to be taken; and diplomatic or consular officers of the United States in any foreign country.

To be attached to Schedule A, after execution before proper officer.

Petitioner's Attorney cannot act as notary.

43 **Schedule B to Petition of Cowen Hosiery Company, Inc.**

Statement of all Property of Bankrupt.

Real Estate.

Estimated Value—None.
Cowen Hosiery Co., Inc., Petitioner, by Elias D. Cowen, Treasurer.

This Schedule must be executed in triplicate.

SCHEDULE B (2).

Personal Property.

	Amount.
A. Cash on hand—Approximately	$25.00
B. Bills of exchange, Promissory notes or securities of any description (each to be set out separately)	None.
C. Stock in trade in business of — at —— of the value of —	.....
Stock in trade at 114 East 23rd St.—Approximately	125,000.00
Stock in Trade in Chicago—Approximately	1,000.00
D. Household goods and furniture, household stores, wearing apparel and ornaments of the person, viz:	None.
44	
E. Books, prints and pictures, viz:	None.
F. Horses, cows, sheep and other animals, with number of each, viz:	None.
G. Carriages and other vehicles, viz:	None.
H. Farming stock and implements of husbandry, viz:	None.
I. Shipping and shares in vessels, viz:	None.
K. Machinery, fixtures, apparatus and tools used in business, with the place where each is situated, viz: Furniture and fixtures at 114 East 23rd St.—Approximately	500.00
L. Patents, copyright and trade-marks, viz:	None.
M. Goods or personal property of any other description with the place where each is situated, viz:	None.
Total	$126,525.00

Cowen Hosiery Co., Inc., Petitioner, by Elias D. Cowen, Treasurer.

This Schedule must be executed in triplicate.

45 SCHEDULE B (3).

Choses in Action.

	Amount.
A. Debts due Petitioner on open account—	
Accounts receivable—Appriximately	$83,071.42
Assigned to Manufacturers' Finance Co...	75,000.00
Balance.....	$8,071.42
A. W. Cowen & Bros., doubtful value in bankruptcy	80,864.90
B. Stock in incorporated Companies, Interest in Joint Stock Companies, and Negotiable Bonds.....	None.
C. Policies of Insurance—Fire Insurance, Liability Insurance, Casualty Insurance.	
D. Unliquidated Claims of every nature with their estimated value.	
E. Deposits of Money in banking institution and elsewhere—	
Tradesmen's Bank, Philadelphia.....	22,383.42
46	
Bank of Manhattan Co.....	1,144.74
Columbia Bank, Offset.	
Irving National Bank, Offset.	
First National Bank of Chicago, Offset.	
Total.....	$112,464.48

Cowen Hosiery Co., Inc., Petitioner, by Elias D. Cowen, Treasurer.

This Schedule must be executed in triplicate.

SCHEDULE B (4).

Property in Reversion, Remainder, or Expectancy, Including Property Held in Trust for the Debtor or Subject to Any Power or Right to Dispose of or to Charge.

(N. B.—A particular description of each interest must be entered. If all or any of the Debtor's Property has been conveyed by Deed or Assignment, or otherwise for the benefit of Creditors, the date of such Deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized from
47 the proceeds thereof, and the disposal of the same, as far as known to the Debtor.)

General interest—Particular description.	Supposed value of my interest.
Interest in Land.....	None.
Personal Property	None.
Property in Money, Stocks, Shares, Bonds, Annuities, etc.	None.

	Amount realized from proceeds of property conveyed.
Rights and Powers, Legacies and Bequests.....	None.
Property Heretofore Conveyed for Benefit of Creditors—What portion of Debtor's property has been conveyed by Deed or Assignment, or otherwise for benefit of Creditors; date of such Deed, name and address of party to whom conveyed, amount realized therefrom, and disposal of same, so far as known to the Debtor	None.

Cowen Hosiery Co., Inc., Petitioner, by Elias D. Cowen, Treasurer.

This Schedule must be executed in triplicate.

48 SCHEDULE B (5).

A Particular Statement of the Property Claimed as Expected from the Operation of the Acts of Congress Relating to Bankruptcy, Giving Each Item of Property and Its Valuation and, if Any Portion of It is Real Estate, Its Location, Description and Present Use.

	Valuation.
Military, Uniform, arms and equipment.....	None.
Property claimed to be exempted by State laws: its valuation; whether real or personal; its descriptions, and present use; and reference given to the Statute of the state creating the exemption.....	None.

Cowen Hosiery Co., Inc., Petitioner, by Elias D. Cowen, Treasurer.

This Schedule must be executed in triplicate.

49 SCHEDULE B (6).

Books, Papers, Deeds, and Writings Relating to Bankrupt's Business and Estate.

The following is a true list of all books, papers, deeds and writings relating to my trade, business, dealings, estate and effects, or any part thereof, which at the date of this Petition are in my possession or under my custody and control, or which are in the possession or custody of any person in trust for me, or for my use, benefit or advantage; and also of all others which may have been heretofore, at any time in my possession, or under my custody or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same:

Books—General books incidental to a going business.
Deeds—None.
Papers—None.
Cowen Hosiery Co., Inc., Petitioner, By Elias D. Cowen, Treasurer.
This schedule must be executed in triplicate.

(N. B.—Oath, as prescribed to Schedule B, to be annexed to this sheet.)

N. B.—The following form of oath to Schedule B of the Petition by Debtor is prescribed and is to be annexed to the same.

50 *Oath to Schedule B.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

On this 24th day of August, A. D. 1922, before me personally came Elias D. Cowen, treasurer of the corporation mentioned in and who subscribed to the foregoing Schedule, and who being by me first duly sworn did declare the said Schedule to be a statement of all its estate, both real and personal, in accordance with the Acts of Congress relating to Bankruptcy.

Subscribed and sworn to before me this 24th day of August, A. D. 1922. Edith Kahn, Notary Public, New York County. (Official Character.)

This oath may be administered by officers authorized to administer oaths in proceedings before Courts in the United States or under the laws of the State where the same are to be taken; and diplomatic or consular officers of the United States in any foreign country.

To be attached to Schedule B, after execution before proper officer.

Petitioner's attorney cannot act as notary.

51 **Summary of Debts and Assets.**

From the Statements of the Bankrupt in Schedules A and B.

Schedule A-1. (1) Taxes and Debts Due United States	$246.00
" " 1. (2) Taxes Due States, Counties, Districts, & Municipalities	.....
" " 1. (3) Wages	.....
" " 1. (4) Other Debts Preferred by Law	.....
" " 2. Secured Claims	202,049.95
" " 3. Unsecured Claims	78,305.05
" " 4. Notes and Bills which ought to be paid by other parties thereto	4,068.41
" " 5. Accommodation Paper	.....
Schedule A, Total	$284,669.41

Schedule B-1.		Real Estate	None.
"	" 2-*a*.	Cash on Hand	$25.00
"	" 2-*b*.	Bills, Promissory Notes and Securities	.....
"	" 2-*c*.	Stock in Trade	126,000.00
"	" 2-*d*.	Household Goods, &c.	.....
"	" 2-*e*.	Books, Prints and Pictures	.....
"	" 2-*f*.	Horses, Cows and other Animals	.....
"	" 2-*g*.	Carriages and other Vehicles	.....
52			
"	" 2-*h*.	Farming Stock and Implements	.....
"	" 2-*i*.	Shipping and Shares in Vessels	500.00
"	" 2-*k*.	Machinery, Tools, &c.	.....
"	" 2-*l*.	Patents, Copyrights and Trade-Marks	.....
"	" 2-*m*.	Other Personal Property	.....
"	" 3-*a*.	Debts Due on Open Accounts, unassigned	88,936.32
"	" 3-*b*.	Stocks, Negotiable Bonds, &c.	.....
"	" 3-*c*.	Policies of Insurance	.....
"	" 3-*d*.	Unliquidated Claims	.....
"	" 3-*e*.	Deposits of Money in Banks and Elsewhere	23,528.16
"	" 4.	Property in Reversion, Remainder, Trust, &c.	.....
"	" 5.	Property Claimed to be Exempt	.....
"	" 6.	Books, Deeds and Papers	.....
		Schedule B, Total	$238,989.48

Cowen Hosiery Co., Inc., Petitioner, By Elias D. Cowen, Treasurer.

This Schedule must be executed in triplicate.

53 United States District Court, Southern District of New York.

[Title omitted.]

Order to Show Cause, Aug. 16, 1922.

Upon the annexed petition duly verified and upon the Petition for involuntary bankruptcy filed herein, it is Ordered that Taubel-Scott-Kitzmiller Co., Inc., or its attorney of record, Herman Goldman, appear at a Term of this Court to be held at the U. S. District Court House, Post-Office Building, Borough of Manhattan, City of New York, on the 16th day of August, 1922, at 2:15 o'clock in the afternoon, and there show cause why the prayer of the annexed Petition should not be granted and why such other and further relief as to the Court may seem just and proper should not be granted, and in the meantime and until further Order of this Court in the

premises, it is hereby Ordered that all proceedings on the part of Taubel-Scott-Kitzmiller Co., Inc., and the Sheriff of the County of New York under the execution issued herein by the said
54 Taubel-Scott-Kitzmiller Co., Inc., are in all respects hereby stayed and enjoined.

Sufficient reason appearing therefor service of this Order to Show Cause and the accompanying Petition if made on or before 12 o'clock noon on this 16th day of August, 1922, shall be deemed good and sufficient service.

Dated, New York, August 16th, 1922. Julius M. Mayer, U. S. Circuit Judge.

55 United States District Court, Southern District of New York.

[Title omitted.]

Petition of Malcolm C. Hutchison.

To the Honorable District Court of the United States for the Southern District of New York:

The Petition of Malcolm C. Hutchison respectfully represents that on this 16th day of August, 1922, he filed a Petition for involuntary bankruptcy against the bankrupt above named. Upon information and belief that the creditors of the alleged bankrupt are less than twelve in number. The Petition charges that the alleged bankrupt is insolvent and committed various acts of bankruptcy during the months of July and August, 1922, by preferring certain of its creditors above other creditors.

Upon information and belief the alleged bankrupt recently admitted to its creditors that it was unable to pay its obligations as they matured and requested the creditors through its committee to take charge of its affairs and make an investigation. A
56 Committee was thereupon appointed consisting of most of its largest creditors. The Committee duly convened and organized and commissioned S. D. Leidesdorf & Co., expert accountants, to audit and examine the books and make a report and also arrange to take an inventory of the merchandise.

That on the 15th day of August, 1922, a Judgment was entered by Taubel-Scott-Kitzmiller Co., Inc., against the above named alleged bankrupt for $39,366.55. Your Petitioner is informed that this Judgment was entered during a course of negotiations between the alleged bankrupt and the creditors' Committee and the plaintiff for an extension of time. Your Petitioner is further advised that there is a partial defense, at least, to the alleged claim of the plaintiff.

That under the said Judgment the plaintiff issued an execution to the sheriff of New York County who made a levy, and the sheriff is now in possession under said levy.

Your Petitioner further shows that upon adjudication the lien of the Judgment will be dissolved. That the presence of the Sheriff's

custodian will add daily expense which will be a charge against the creditors.

Your petitioner therefore prays that an Order be granted returnable forthwith, ordering the Judgment creditor to show cause why the Sheriff of the County of New York, his agents and deputies, should not be restrained from continuing to levy under the Judgment and why the Sheriff's custodian should not be removed, and why
57 such other and further relief as to the Court may seem just and proper in the premises should not be granted, for which no previous application has been made. Malcolm C. Hutchison.

UNITED STATES OF AMERICA,
Southern District of New York:

Malcolm C. Hutchison the Petitioner above named, being duly sworn, does hereby make solemn oath that the statements contained in the foregoing Petition subscribed by him are true to the best of his knowledge, information and belief. Malcolm C. Hutchison.

Sworn to before me, this 16th day of August, 1922. C. G. P Knight, Notary Public, New York County. Commission expires March 30, 1924.

58 At a Stated Term of the United States District Court Held in and for the Southern District of New York, Post Office Building, in the Borough of Manhattan, City, County, and State of New York, on the 18th Day of August, 1922.

Present: Hon. Julius M. Thayer, Circuit Judge, sitting in the U. S. District Court.

[Title omitted.]

Temporary Restraining Order of August 18th, 1922.

A motion having duly come on to be argued upon the return of an Order to Show Cause, issued August 16, 1922, for an Order directing that all proceedings on the part of Taubel-Scott-Kitzmiller Co., Inc., in an action against the alleged bankrupt in which the said Taubel-Scott-Kitzmiller Co., Inc., entered a Judgment for $39,-366.55, be stayed and that the Sheriff of the County of New York, his agents and deputies, be enjoined and restrained from continuing in possession of property of the alleged bankrupt on a levy
59 under execution issued on said Judgment and for such other and further relief as to the Court may seem proper and just, and after reading and filing the Petition for Involuntary Bankruptcy and the Petition of Malcolm C. Hutchison verified August 16, 1922, and the Order to Show Cause, dated August 16, 1922, in support of the said application, and after hearing Irving L. Ernst, Esq., of counsel for the Petitioning Creditor; David J. Fox, Esq., of counsel

for Columbia Bank, a creditor, and David W. Kahn, Esq., of counsel for the alleged bankrupt in support of said application and Herman Goldman, Esq., of counsel for Taubel-Scott-Kitzmiller Co., Inc., in opposition thereto, and due deliberation having been had,

Now on motion of Olcott, Bonynge, McManus & Ernst, attorneys for the Petitioning Creditors, it is hereby

1. Ordered, That until there shall be an adjudication in bankruptcy in this matter, or a dismissal of the Petition, or until further order of the Court in the Premises, Taubel-Scott-Kitzmiller Co., Inc., and Herman Goldman, its attorney of record, be and they are each hereby enjoined and restrained from further prosecuting the suit in which Taubel-Scott-Kitzmiller Co., Inc., is plaintiff and judgment-creditor and the alleged bankrupt is defendant and judgment-debtor, and they and each of them are hereby enjoined from proceeding to enforce or collect the Judgment entered in favor of Taubel-
60 Scott-Kitzmiller Co., Inc., against the alleged bankrupt for $39,366.55, and from taking any proceedings on the execution issued to the Sheriff of the County of New York under said Judgment except to request the Sheriff of the County of New York, his agents and servants, to surrender all property levied upon under said execution to the alleged bankrupt and said Taubel-Scott-Kitzmiller Co., Inc., and Herman Goldman, its attorney, be and they are hereby enjoined and restrained from taking any proceedings in aid of or supplementary to execution, or any proceedings of any nature under the said Judgment or execution to aid in the collection or enforcement of said Judgment or execution, and they are each hereby enjoined and restrained from in any manner interfering with the property and assets of the alleged bankrupt; and it is further

2. Ordered, That the Sheriff of the County of New York, his agents and deputies, be and they hereby are enjoined from continuing the levy made by them, or either of them, under the execution issued on the said Judgment obtained by Taubel-Scott-Kitzmiller Co., Inc., and the said Sheriff is hereby directed to relinquish his levy and to deliver all property levied upon to the alleged bankrupt upon the payment of his proper fees and charges; and it is further

3. Ordered, That Taubel-Scott-Kitzmiller Co., Inc., may move to vacate, modify or limit any of the provisions of this Order
61 upon any change of circumstances or position upon twenty-four hours' notice in writing to the following attorneys: Olcott, Bonynge, McManus & Ernst, attorneys for Petitioning Creditors; David J. Fox, attorney for Columbia Bank; H. & J. J. Lesser, attorneys for creditors; Leo Oppenheimer, attorney for creditors; David W. Kahn, attorney for alleged bankrupt. J. M. Mayer, U. S. Circuit Judge.

At a Stated Term of the District Court of the United States for the Southern District of New York held in and for said District, at the United States Post Office and Court Building, in the Borough of Manhattan, City of New York, on September 6, 1922.

Present: Hon. Martin T. Manton, Circuit Judge, sitting in the United States District Court.

62 [Title omitted.]

Order of September 6, 1922, Vacating Temporary Restraining Order.

An order having been made herein on August 18, 1922, by this Court, Hon. Julius M. Mayer presiding, on motion of Olcott, Bonynge, McManus & Ernst, attorneys for the petitioner creditor, restraining the Sheriff of the County of New York, Taubel-Scott-Kitzmiller Co., Inc., a creditor, and Herman Goldman, attorney for the creditor, from proceeding in the manner specified in said order, and it being provided in the said order that the said creditor
63 might move to vacate said order on twenty-four hours' notice to the following attorneys: Olcott, Bonynge, McManus & Ernst, attorneys for petitioning creditor, David J. Fox, attorney for Columbia Bank, H. & J. J. Lesser, attorneys for creditors, Leo Oppenheimer, attorney for creditors and David W. Kahn, attorney for alleged bankrupt.

Now, upon the subjoined consent of Olcott, Bonynge, McManus & Ernst, attorneys for said petitioning creditor, David J. Fox, attorney for Columbia Bank, H. & J. J. Lesser, attorneys for creditors, Leo Oppenheimer, attorney for creditors, David W. Kahn, attorney for alleged bankrupt and Herman Goldman, attorney for Taubel-Scott-Kitzmiller Co., Inc., it is hereby

Ordered that the said order of August 18, 1922, be and the same is hereby vacated, set aside and made null and void and of no force and effect.

Enter. Manton, United States Circuit Judge.

64 The making and entry of the above order is hereby consented to this 6th day of September, 1922. Olcott, Bonynge, McManus & Ernst, Attorney for Petitioning Creditor. David J. Fox, Attorney for Columbia Bank. Leo Oppenheimer, Attorney for Creditors. H. & J. J. Lesser, Attorneys for Creditors. David W. Kahn, Attorney for Bankrupt. Herman Goldman, Attorney for Taubel-Scott-Kitzmiller Co., Inc.

65 United States District Court for the Southern District of New York.

[Title omitted.]

Order to Show Cause.

Upon reading the petition of Walter E. Ernst, verified the 29th day of August, 1922 and upon all the proceedings had herein,

Now, on motion of Olcott, Bonynge, McManus & Ernst, attorneys for Malcolm C. Hutchison, a creditor herein, and the Creditors' Committee, it is

Ordered, that Taubel-Scott-Kitzmiller Company, Inc., and Herman Goldman, its attorney of record, and the sheriff of New York County and his attorney, show cause at a Stated Term of this court, appointed to be held at the United States Court House, Post Office Building, Borough of Manhattan, City, County and State of New York, on the 30th day of August, 1922, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made ousting the sheriff, his deputies and representa-
66 tives from possession of the bankrupt's property at 114 East 23rd Street in the Borough of Manhattan, City of New York, and why all persons, including Taubel-Scott-Kitzmiller Company, Inc., the sheriff, his deputies and representatives, and all firms and corporations and any and all landlords or owners or agents of any premises wherein any property of the bankrupt may be situated or stored, and the representatives, agents, attorneys and servants of all such landlords, owners or agents, and all sheriffs, marshals or other officers and their deputies, representatives and servants, should not be stayed, enjoined and restrained, until a further order of this court in the premises, from removing, transferring, selling, delivering or disposing of or attempting in any way to remove, sell, transfer, deliver or dispose of or in any way interfering with any property, assets and effects in the possession or belonging to said bankrupt, and in the possession of any officers, agents, attorneys or representatives of said bankrupt, and from executing or issuing or causing the execution or issuance or the suing out of any court of law or equity of any writ, process, summons, attachment, replevin and precept in dispossess proceeding or any other proceeding, actions or conduct whatsoever, for the purpose of impounding or taking possession of or interfering with any property owned by or in the possession of said bankrupt or owned by said bankrupt, or in possession of any agent, servant or attorney of said bankrupt, and from interfer-
67 ing or impeding the carrying on of the business at 114 East 23rd Street, Borough of Manhattan, City of New York, and why the question of whether or not the bankrupt was solvent on August 15, 1922, the date Taubel-Scott-Kitzmiller Company, Inc., entered a judgment in the office of the Clerk of New York County of $39,366.55, should not be immediately referred to a Special Commissioner for examination, taking testimony and report, and why

such other and further relief may not be granted as in the premises may be just and lawful.

Ordered, that service on or before the 29th day of August, 1922, of a copy of this order, together with a copy of the petition and affidavit on the said Herman Goldman and George Olvany before 9:15 A. M., August 30, 1922, shall be sufficient.

Dated, New York, N. Y., August 29th, 1922. J. W. Mack, U. S. Circuit Judge.

68 United States District Court for the Southern District of New York.

[Title omitted.]

Petition of Walter E. Ernst.

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The petition of Walter E. Ernst respectfully shows

First. That he is an attorney and counsellor at law, and a member of the firm of Olcott, Bonynge, McManus & Ernst, attorneys for the creditors' committee herein, and also for Malcolm C. Hutchison, a creditor having a provable claim against Cowen Hosiery Company, Inc., the bankrupt herein, for the sum of $25,000.00.

Second. That the said bankrupt was duly adjudicated herein on the 25th day of August, 1922. Upon information and belief, the bankrupt estate consists principally of a hosiery business, located at 114 East 23rd Street, in the Borough of Manhattan, City of
69 New York, and the assets in the aggregate are worth substantially $200,000.00.

Third. That on or about August 15, 1922, while the bankrupt was insolvent, Taubel-Scott-Kitzmiller Company, Inc., who had reasonable cause to believe, and knew or should have known by making such inquiry as a reasonable person would have made could have ascertained that said Cowen Hosiery Company, Inc., the bankrupt herein, was insolvent, duly entered a judgment in the office of the Clerk of the Supreme Court of New York County. That the said Taubel-Scott-Kitzmiller Company, Inc., caused an execution to be issued upon the said judgment to the Sheriff of the County of New York, who immediately levied upon the property and assets of the above named bankrupt at No. 114 East 23rd Street, in the Borough of Manhattan, City of New York.

Fourth. That the Sheriff of New York County is now in possession and control of the property of the bankrupt at the above address, and the said Taubel-Scott-Kitzmiller Company, Inc., has been and is endeavoring to obtain a preference over the other creditors of the said bankrupt. Upon information and belief a person employed in the office of Herman Goldman, 120 Broadway, Borough of Manhattan, City of New York, attorney for Taubel-Scott-Kitzmiller

Company, Inc., has been appointed a Deputy Sheriff and is now in possession of the bankrupt's property at 114 East 23rd
70 Street, Borough of Manhattan, City of New York, acting on behalf of the Sheriff; that the Sheriff and his deputies and the employees of the attorney for Taubel-Scott-Kitzmiller Company, Inc., have been interfering with the property of this bankrupt, and that the personnel employed by it have prevented, impeded and harassed the Creditors' Committee and those representing said Committee, and have in fact made it almost impossible to continue the business of the bankrupt in order to serve the best interests of all the creditors. Upon information and belief that the conduct and actions on the part of said Taubel-Scott-Kitzmiller Company, Inc., the Sheriff and his deputies, have been in violation of the order heretofore made by the Honorable Julian W. Mack, restraining said Sheriff from interefring with the property.

Fifth. Your petitioner respectfully shows to this Honorable Court that it is for the best interests of all the creditors of this estate, and absolutely necessary to preserve the rights of all interested parties, that all persons, firms and corporations, and any and all landlords or owners or agents of any premises wherein any property of the bankrupt may be situated or stored, and the representatives, agents, attorneys and servants of all creditors, and especially the judgment creditor, Taubel-Scott-Kitzmiller Company, Inc., landlords, owners or agents, and all sheriffs, marshalls and other officers and their deputies attorneys, representatives and servants, and each
71 of them, should be enjoined and restrained from removing, transferring, selling, delivering or disposing of or attempting in any way to remove, sell, transfer, deliver or dispose of or in any way interfering with any property, assets and effects in the possession of and belonging to the said bankrupt, and in the possession of any officers, agents, attorneys or representatives of said bankrupt, and all said persons should be enjoined from executing or issuing or causing the execution or issuance or the suing out of any court of law or equity of any writ, process, summons, attachment, replevin and precept in dispossess proceeding or any other proceeding for the purpose of impounding or taking possession of or interfering with any property owned by or in the possession of said bankrupt or owned by said bankrupt, and in the possession of any agent, servant or attorney of said bankrupt.

Sixth. Further, that the sheriff, his deputies and representatives should be ousted from the possession of said business located at 114 East 23rd Street, in the Borough of Manhattan, City of New York, and ordered to leave said premises and enjoined from returning thereto without prejudice and preserving at all times the rights of Taubel-Scott-Kitzmiller Company, Inc., under the judgment heretofore entered on August 15, 1922, and that the question of whether or not the bankrupt was solvent in the bankruptcy sense on August 15, 1922, should be immediately referred to a Special
72 Commissioner to examine, take testimony and report.

Seventh. That the reason this application is brought on by an order to show cause instead of the usual notice of motion is

that the conduct and actions of the sheriff and his deputies now in possession of said premises are such that unless they are ousted immediately the creditors of this estate will suffer irreparable injury. That no previous application has been made for the relief hereinafter asked for.

Wherefore, your petitioner prays for an order to show cause, addressed to Taubel-Scott-Kitzmiller Company, Inc., their attorney, Herman Goldman, and the sheriff and his representatives, why an order should not be made ousting the sheriff and his deputies from possession of the premises above named without prejudice and preserving all the rights of Taubel-Scott-Kitzmiller Company, Inc., under their judgment hereinbefore mentioned, and why the question of whether or not the bankrupt was solvent on August 15, 1922, should not be referred immediately to a Special Commissioner, and for such other and further relief as to the court may seem just and proper. Walter E. Ernst, Petitioner.

73 STATE OF NEW YORK,
County of New York, ss:

Walter E. Ernst, being duly sworn, deposes and says:

That he is the petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. Walter E. Ernst.

Sworn to and subscribed before me this 29th day of August, 1922. Nathan Ballin, Notary Public, Kings County. Certificate filed N. Y. and Bronx Counties. Kings Co. Clerk's No. 80 Register's No. 4065. N. Y. Co. Clerk's No. 74, Register's No. 4086. Bronx Co. Clerk's No. 4, Register's No. 168. Commission expires March 30, 1924.

74 United States District Court for the Southern District of New York.

[Title omitted.]

Affidavit of Rufus W. Scott.

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

Rufus W. Scott, being duly sworn says:

First. I am an officer, to wit: the Chairman of the Board of Directors of Taubel-Scott-Kitzmiller Co., Inc., which is a corporation organized and existing under the laws of the State of New Jersey.

Second. Said corporation is a creditor of the above named bankrupt in the sum of Thirty nine thousand three hundred sixty-six and

55/100 dollars ($39,366.55) as evidenced by a judgment entered in the office of the Clerk of the County of New York on August 15, 1922. On said date and at the time of the entry of said Judgment, I am informed and verily believe it to be true that said bankrupt was solvent and that its assets largely exceeded its liabilities. On this date I also am informed and verily believe it to be true
75 that said bankrupt was solvent and that its assets largely exceeded its liabilities. I have had charge of the collection of said claim on behalf of said creditor, and my information and belief with regard to the condition of said bankrupt on said date is the information and belief of said creditor. A source of my information and the grounds of my belief both on said date and on this date are reports made to me by the attorney for the said creditor Herman Goldman, whose office is 120 Broadway, Borough of Manhattan, City of New York, and Max A. Geller, an attorney associated with Mr. Goldman. I was informed on August 8, 1922, that Mr. Henry Flugelman and that Mr. Henry F. Blum, both attorneys speaking on behalf of the Cowen Hosiery Co., Inc., now adjudged a voluntary bankrupt, in the presence of William Cowen the President of said Company, and in the presence of Elias D. Cowen, its Secretary and Treasurer, stated that the Cowen Hosiery Co., Inc., was solvent and that its assets exceeded its liabilities by approximately Sixty thousand dollars ($60,000). My present information and belief with regard to the condition of said Company is further fortified by the circumstance that since said date, namely August 8, 1922, the affairs of the said Cowen Hosiery Co., Inc., have been in the hands of a Creditor's Committee, and that practically no business has been transacted so that its affairs have remained in practically a constant state. On August 25, 1922, the bankrupt filed its voluntary
76 petition, annexed to which are schedules, as required by the Bankrupt Act. I respectfully make a part of this affidavit the said voluntary petition and annexed schedules with the same force and effect as if the same were here at length set forth. The said schedules upon correct scrutiny and analysis indicate a clear solvency on the part of this bankrupt to a very considerable extent. I am further informed and believe that Elias D. Cowen, the Treasurer of the said bankrupt, who is the officer in charge of the finances and financial affairs of the Company, has stated under oath in an examination under Section 21A of the Bankrupt Act that in making out the schedules he understated the amount of assets in that he included as the value of the merchandise only One hundred twenty-five thousand dollars ($125,000), whereas as a matter of fact the figure should have been Two hundred ten thousand dollars ($210,000). Hence, there is an additional excess of assets over liabilities to the extent of Ninety-five thousand dollars ($95,000).

Third. I have read the petition of Walter E. Ernst annexed to the order to show cause by which this motion was brought on, and note that it is therein stated that my Company in entering said judgment and attempting the collection thereof, has sought to obtain a preference over other creditors. I most earnestly deny this alle-

gation. In entering said judgment and issuing said execution my Company has attempted to procure satisfaction in full of a claim against a Company which it sincerely believes to be in a
77 thoroughly solvent condition. Since the entry of said judgment there have been filed two involuntary petitions in bankruptcy against the above named bankrupt. To both of these involuntary petitions my Company has interposed verified answers. In the proceeding instituted by the first involuntary petition my Company through its attorneys has procured an order for the examination of the officers of this bankrupt, and of various other witnesses for the purpose of ascertaining and rendering available to the creditors of this Company full satisfaction of all of their claims, and is informed and believes that if its search for assets can go forward unimpeded that not alone our own judgment but the claims of every other creditor can be satisfied in full.

I note the unusual prayer on the part of the creditors for a reference to enable them to demonstrate the insolvent condition of this bankrupt despite the persistent evidences of solvency and submit that the position of our Company is the one for the best interests of this estate and not the position of those who are continuously asserting and continuing their attempt to establish that creditors are entitled to less than complete satisfaction of their claims.

Fourth. The Taubel-Scott-Kitzmiller Co., Inc., has taken no steps and has done no act that would in any wise harass either the said bankrupt or the Creditor's Committee, and has caused no one in its behalf so to do, and submits the annexed affidavits of Max A.
78 Geller and Benjamin L. Greenstein to demonstrate that no one acting in its behalf, nor in prosecution of its judgment has done any act which would in any wise interfere with the exercise of the legal rights of any one connected with these proceedings. The only acts which were done, and these I am informed cannot be complained of, have been those acts which are necessary to protect the rights secured by my Company and to prevent the concealment and dissipation of the assets which have been levied upon. Rufus W. Scott.

Sworn to before me this 30th day of August, 1922. Andrew J. Arbuckle, Notary Public, Kings County. Clerk's No. 99, Register's No 4107. Certificate filed in New York County. Clerk's No. 258, Register's No. 4202. Certificate filed in Bronx County. Clerk's No. 8, Register's No. 79. Commission expires March 30, 1924.

79 District Court of the United States for the Southern District of New York.

[Title omitted.]

Affidavit of Max A. Geller.

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

Max A. Geller, being duly sworn, says:

First. I am an attorney and counsellor at law, associated with Herman Goldman, the attorney for Taubel-Scott-Kitzmiller Company, a creditor herein and had charge of the action in the Supreme Court, New York County, in which said creditor was plaintiff and in which the above named bankrupt was defendant. The said action was instituted on or about July 25th, 1922, to recover the reasonable value and agreed price of goods, wares and merchandise sold, delivered and accepted. On August 8th, prior to the expiration of said Cowen Hosiery Co., Inc.'s time to answer said complaint, I attended a meeting of the creditors of the above named bankrupt at the office of Henry Flugelman, 29 Broadway, Borough of Manhattan, City of New York. At said meeting, creditors of the
80 above named bankrupt and of A. W. Cowen Bros. Co. Inc., were assembled and it was stated to the said meeting that the affairs of the two companies were very closely intertwined and that A. W. Cowen Bros. Co. Inc., was hopelessly insolvent and that many of the creditors of the two companies were identical and that therefore the creditors of both companies had been called together. It was stated at that meeting by Mr. Henry F. Blum, whom, I am informed and believe, is an attorney of the State of Illinois, having his office in Chicago, that the Cowen Hosiery Co., Inc. (now a voluntary bankrupt) was amply solvent and that its assets exceeded its liabilities by a sum in excess of Fifty-six Thousand ($56,000) Dollars. The said Blum gave an itemized account of the character of the assets, giving the amount of its cash, its accounts receivable and its merchandise and other property. The said Blum concluded his statement with the remark that there was absolutely no question as to the solvency of the Cowen Hosiery Co., Inc.

Second. At the conclusion of said meeting I immediately informed Herman Goldman, who is the attorney for said Taubel-Scott-Kitzmiller Company, with regard to the statements made by Blum, who made said statements in the presence of William Cowen and Elias D. Cowen, who are respectively, the President and the Secretary and Treasurer of the bankrupt, and said Herman
81 Goldman at once informed Mr. Rufus W. Scott, who is the Chairman of the Board of Directors of Taubel-Scott-Kitzmiller Company.

Third. After the time to answer the said complaint had expired, no answer having been interposed by the said Cowen Hosiery Co.,

Inc., the judgment aforesaid was entered without any additional or other information with regard to the assets and condition of the company, now bankrupt.

Fourth. I have read the petition of Walter E. Ernst, annexed to the order to show cause, by which this motion is brought on. It is there stated that an adjudication in bankruptcy was entered herein on August 25th, 1922. It is not stated, however, that the said adjudication was upon a voluntary petition, which did not allege insolvency on the part of the said bankrupt and I hereby state that such adjudication was so entered upon such voluntary petition.

Fifth. I attended at the examination under Section 21-A of the Bankruptcy Act of the United States, of Elias D. Cowen, the Treasurer of said bankrupt and at said examination said Cowen stated that he was in error in the compilation of the schedules annexed to the voluntary petition. He stated that instead of placing the merchandise of the bankrupt at $125,000 the figure should have been $210,000. I beg to incorporate herein and make part of this affidavit the testimony of Elias D. Cowen, and shall submit a copy
82 thereof as a portion of these answering papers as soon as the same is transcribed by the official stenographer.

Sixth. I have been present on numerous occasions since the Sheriff has levied thereon, at the premises of the above named bankrupt at 114 East 23rd Street, Borough of Manhattan, City of New York, and have observed the acts and conduct of those in charge of the said levy on behalf of the Sheriff of the County of New York and the said custodians and deputies have at all such times been engaged merely in watching the exits from the said premises to see that no property was removed therefrom. They have at no such time in any wise interfered with the acts of any one, either of the bankrupts or of the Creditors' Committee. On the other hand there have, on numerous occasions, been others who have been engaged in watching the said premises, including the custodian on behalf of the so-called Creditors' Committee and private detectives whom, I am informed and believe, are in the employ of the bankrupt. The said premises are very great in extent, occupying an entire loft in a building which is approximately a block in depth and as nearly as I can estimate 150 to 200 feet in width. The passenger elevators are on one side of this loft and the freight elevators are on the extreme other side of the loft. Between these two elevators there are numerous partitions and shelves where merchandise is stocked and it is impossible for any one person to guard against a re-
83 moval of property by both of these exists simultaneously. For that reason it has been necessary for the Sheriff to have two custodians upon the premises at the same time and as one of these custodians the Sheriff has appointed Benjamin L. Greenstein, who is at other times a clerk in the office of said Herman Goldman. Said appointment, as I am informed and believe will lessen the cost of the said levy to this State. Max A. Geller.

Sworn to before me this 29th day of August, 1922. Harry G. Liese, Notary Public, Kings County. Kings County No. 175. Kings

Reg. No. 3000. Certificate filed in New York County No. 11. New York County Register No. 3006. My Commission expires March 30, 1923.

84 District Court of the United States for the Southern District of New York.

[Title omitted.]

Affidavit of Benjamin L. Greenstein.

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

Benjamin L. Greenstein, being duly sworn, says:

First. I am a clerk in the office of Herman Goldman, attorney for Taubel-Scott-Kitzmiller Company, a creditor herein.

Second. I have read the petition verified by Mr. Walter E. Ernst and note therein the statement that an employee of the office of said Herman Goldman has been made a deputy sheriff for the purposes of the levy on the property and assets of the above named bankrupt. I believe that said statement refers to myself as no other employee of the office of Herman Goldman has been placed any wise in charge of the said premises.

85 Third. I have not been appointed a deputy sheriff by the Sheriff of the County of New York but have been appointed custodian to cooperate with other custodians under charge of Patrick F. Halloran to guard the said property against removal. Said appointment is as of the date of August 25th, 1922, and I annex hereto and make a part of this affidavit a copy of said appointment. I have been in attendance at the said premises daily since my said appointment and neither I nor any other deputy or custodian appointed by said Sheriff or any employee or anyone else associated with said Herman Goldman have in any wise interfered with the bankrupt or the Creditors' Committee or any representative thereof. On the other hand the said bankrupt has apparently been attending to such business as it could find despite the fact that it is in bankruptcy. Benjamin L. Greenstein.

Sworn to before me this 29th day of August, 1922. Harry G. Liese, Notary Public, Kings County. Kings County No. 175. Kings Reg. No. 3000. Certificate filed in New York County No. 11. New York County Registers No. 3006. My Commission expires March 30, 1923.

86 *Execution, Issued Aug.* 15, 1922, *for* $39,366.55.

New York Supreme Court.

[Title omitted.]

Copy of Authorization Annexed.

I hereby depute, authorize and appoint Mr. Benjamin L. Greenstein and all and every person or persons aiding and assisting him in the premises to take charge of and safely keep the property at 116 E. 23 St. seized and levied upon by me by virtue of the Execution above mentioned.

Given under my hand at The City of New York, this 25th day of August, 1922. (Sgd.) P. E. Nagle, Sheriff of the County of New York. (Sgd.) Patrick F. Halloran, Deputy Sheriff.

87 At a Stated Term of the United States District Court Held in and for the Southern District of New York, at the Court House and Post Office Building, in the Borough of Manhattan, City of New York, on the 25th Day of August, 1922.

Present: Hon. Julian W. Mack, Circuit Judge.

[Title omitted.]

Restraining Order of August 25, 1922.

Upon the annexed petition of Elias D. Cowen, Treasurer of Cowen Hosiery Co., Inc., the bankrupt herein, and upon the voluntary petition filed herein on the 25th day of August, 1922, and the order of adjudication thereon dated, the 25th day of August, 1922, and on motion of David W. Kahn, attorney for the bankrupt, it is

Ordered that the Sheriff of the County of New York, his deputies, agents, and servants, the Taubel-Scott-Kitzmiller Co., Inc., its attorneys, agents, servants and employees, be and they are
88 hereby restrained from proceeding under a judgment entered in favor of Taubel-Scott-Kitzmiller Co., Inc., on the 15th day of August, 1922, and the execution issued thereunder to the Sheriff of the County of New York. J. W. Mack, C. J.

[File endorsement omitted.]

89 United States District Court, Southern District of New York.

[Title omitted.]

Petition of Elias D. Cowen.

[Filed Aug. 25, 1922.]

To the Honorable District Court of the United States for the Southern District of New York:

The petition of Elias D. Cowen respectfully represents:

That he is treasurer of Cowen Hosiery Co., Inc., the bankrupt herein.

That on or about the 25th day of August, 1922, a voluntary petition in bankruptcy was filed on behalf of the corporation, and thereafter, on or about the same day the corporation was duly adjudicated a bankrupt.

That a creditor of the bankrupt by the name of Taubel-Scott-Kitzmiller Co., Inc., secured a judgment against the bankrupt in the sum of approximately $39,366.85. That thereafter an execution was issued upon said judgment to the Sheriff of the County of New York, who, on the 15th day of August, 1922, made
90 a levy upon the property of the bankrupt at No. 114 East 23rd Street, in the Borough of Manhattan, City of New York, and the said Sheriff continues in the possession of the property of the bankrupt at the address given above. That your petitioner submits that inasmuch as an adjudication in bankruptcy has already been had, the possession by the Sheriff of the property of the proceedings under the judgment and levy set forth above would give the judgment creditor a preference over all the creditors in the proceeding.

Wherefore, your petitioner prays that the annexed order be made restraining the Sheriff, the judgment creditor and its attorney from proceeding under the judgment and levy set forth above, and for an order requiring the Sheriff to surrender the property subject to his lien, if any, for his lawful fees. Elias D. Cowen, Petitioner.

City and County of New York, *ss:*

Elias D. Cowen, being duly sworn, deposes and says that he is the petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowl-
91 edge, except as to matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true. Elias D. Cowen.

Sworn to before me this 25th day of August, 1922. Edith Kahn, Notary Public, etc.

[File endorsement omitted.]

92 At a Stated Term of the United States District Court Held in and for the Southern District of New York, at the United States Court House and Post Office Building, in the Borough of Manhatan, City of New York, on the — Day of August, 1922.

Present: Hon. Julian W. Mack, Circuit Judge.

[Title omitted.]

Restraining Order Entered September 1st, 1922.

An application having been made on the 30th day of August, 1922, upon the call of the motion calendar for an order restraining the Sheriff of the County of New York, his deputies, agents, servants or employees from removing from the premises of the bankrupt, and also restraining the said Sheriff, his deputies, agents, servants or employees from in any way interfering with the said property, assets and effects, except to continue in possession thereof under the levy heretofore made by the said sheriff and for

93 no other purpose and also restraining the Taubel-Scott-Kitzmiller Co., Inc., its attorneys, agents, servants or employees, from taking any proceedings under a judgment entered in favor of the Taubel-Scott-Kitzmiller Co., Inc., against the above named bankrupt on the 15th day of August, 1922, and the execution issued thereunder to the Sheriff of the County of New York and the said motion having been argued by David W. Kahn, attorney for the bankrupt, and by Walter E. Ernst, Esq., of counsel for the petitioning creditors herein in support of the motion, and Elkin Turk of Counsel for Taubel-Scott-Kitzmiller Co., Inc., having also been heard and having made no opposition, now upon the voluntary petition in bankruptcy filed herein and the order of adjudication entered thereon, and upon all the proceedings had herein, and on motion of David W. Kahn, attorney for the bankrupt, it is

Ordered, 1. That the Sheriff of the County of New York, his deputies, agents, servants or employees be and they severally are restrained and enjoined from removing from the premises of the bankrupt any of the property, assets and effects of the bankrupt estate, and the said Sheriff, his deputies, agents, servants or employees be and they hereby are further restrained from in any way interfering with any of the property, assets and effects, except that they may continue in possession thereof, under the levy heretofore made and for no other purpose, and it is further

94 Ordered, 2. That the Taubel-Scott-Kitzmiller Co., Inc., its attorneys, agents, servants or employees, be and they hereby are restrained from taking any proceedings under the judgment entered in favor of the Taubel-Scott-Kitzmiller Co., Inc., against the bankrupt herein on the 15th day of August, 1922, and the execution issued thereunder to the Sheriff of the County of New York, until the further order of this Court. J. W. Mack, C. J.

95 At a Stated Term of the District Court of the United States for the Southern District of New York Held in and for the said District, at the United States Post Office and Court Building, in the Borough of Manhattan, City of New York, on the 18th Day of September, 1922.

Present: Hon. Julian W. Mack, Circuit Judge.

[Title omitted.]

Order of September 18, 1922, Vacating Restraining Orders of Aug. 25 and Sept. 1, 1922.

The Court, having heretofore and on or about August 25th, 1922, and on or about September 1st, 1922, made its orders in the manner therein, respectively provided, staying the Sheriff of the County of New York from proceeding under a levy of execution, issued on August 15th, 1922, pursuant to a judgment that day entered and filed in the office of the Clerk of the County of New York in favor of Taubel-Scott-Kitzmiller Co., Inc., and against the above
96 named bankrupt, and a motion having been made by the said Taubel-Scott-Kitzmiller Co., Inc., to vacate the said orders imposing said stays unless the trustees in bankruptcy should, within ten days after the date of the order to be entered upon said motion, commence plenary suits to vacate and set aside the said levy and release the property of the bankrupt from the lien thereby imposed.

Now, on reading and filing the order to show cause therein, dated September 16th, 1922, made by Hon. Julian W. Mack, Circuit Judge, and the petition of Taubel-Scott-Kitzmiller Co., Inc., verified on September 16th, 1922, thereto annexed, and upon the two involuntary petitions heretofore filed by Malcolm W. Hutchison against the above named bankrupt, and upon the voluntary petition in bankruptcy herein and the schedules thereto annexed and upon the order to show cause, dated August 16th, 1922, made by Hon. Julius M. Mayer, Circuit Judge, and the petition thereto annexed, and the order, dated August 18th, 1922, entered thereon, and the order of this Court, entered September 6th, 1922, vacating the same and the consents thereto annexed, and upon the order to show cause made on August 29th, 1922, by Hon. Julian W. Mack, Circuit Judge, and the petition thereto annexed and the affidavits submitted in opposition thereto and upon the letter of Olcott, Bonynge, McManus & Ernst, dated September 8th, 1922, addressed to Hon. Julian W. Mack, withdrawing said motion, and upon the
97 order to show cause herein, made by Hon. Seaman Miller, the Referee, on September 15th, 1922, and the petition of the Trustees herein, verified September 14th, 1922, thereto annexed, and upon the order of this Court, Hon. Julian W. Mack presiding made and entered on August 25th, 1922, and the petition of Elias D. Cowen, verified August 25th, 1922, thereto annexed, and upon the order of this Court, Hon. Julian W. Mach presiding, without

date, but entered in the office of the Clerk of this Court on September 1st 1922, all in support of the said motion and upon hearing Elkin Turk, of counsel for said Taubel-Scott-Kitzmiller Co., Inc., in support of said motion and after hearing Irving L. Ernst, of counsel for the Trustees, in opposition thereto, and due deliberation thereon having been had, it is hereby

Ordered, that the said motion be and the same is hereby in all respects granted, and the order of this Court, Hon. Julian W. Mack presiding, made and entered August 25th, 1922, which restrained the Sheriff of the County of New York and the said Taubel-Scott-Kitzmiller Co., Inc , in the manner therein provided, and the order of this Court, without date, Hon. Julian W. Mack presiding, which order was entered in the office of the Clerk of this Court on September 1st, 1922, be and they and each of them are hereby vacated and set aside and the stays and injunctions therein imposed are vacated and set aside unless on or before October 9th, 1922, the Trustees herein institute and commence a plenary suit or action
98 against said Taubel-Scott-Kitzmiller Co., Inc., and the Sheriff of the County of New York in a court having proper jurisdiction thereof, to release the property of the said bankrupt from the levy of the said Sheriff's execution, provided that if and so long as the Trustees so institute such suit or action and diligently prosecute the same, then the stays contained in said orders shall remain in full force and effect until the determination of such suit or action by a court of last resort or by a court of original or intermediate jurisdiction, the time to appeal from which shall have elapsed; and it is further

Ordered, that the order to show cause made by Hon. Seaman Miller, Referee in Bankruptcy, directing the Taubel-Scott Kitzmiller Co., Inc., to show cause why the judgment entered in its favor against the bankrupt on August 15, 1922, and the levy upon the execution issued thereunder should not be deemed null and void, and why the property affected by said levy and judgment should not be deemed wholly discharged and released therefrom, and why said property should not pass to the trustees as part of the estate of the bankrupt, is hereby vacated and set aside on the ground that the Referee in Bankruptcy was without jurisdiction to make the same, inasmuch as the rights of said Taubel-Scott-Kitzmiller Co., Inc., cannot be determined in a summary proceeding, but only by a plenary suit instituted by the trustee against it, and it is further
99 Ordered that in the event that prior to the termination of the stays imposed by said order of August 25, 1922, and by said order without date, but entered in the office of the Clerk of this Court on September 1. 1922, as the termination of said stays is herein provided for, an order of this Court shall be made directing the sale of the entire property of the bankrupt, the property which is subject to the lien resulting from said judgment, execution and levy shall be included in the sale conducted pursuant to such order, and such property shall on such sale be sold free and clear of all liens

and encumbrances, but the proceeds of the sale pursuant to such order shall to the extent of the amount accrued by said lien at the date of such sale, be collected from the purchasers upon such sale by the Sheriff of the County of New York, and the amount so collected by him shall be held by him in place and stead of said property bound by the stays provided for by said orders until the final determination of such plenary suit by a competent court of ultimate appeal, or by a competent court of original or intermediate jurisdiction from the determination of which the time to appeal has expired; and if such final determination be that said lien is valid, then the said Sheriff shall forthwith be released from the restraints imposed by said orders of this Court, and the Sheriff may forthwith pay over the amounts held by him in accordance herewith to the said Taubel-Scott-Kitzmiller Co., Inc., and if said final determination be that said lien is invalid, then upon the entry of such
100 judgment avoiding said lien, the said Sheriff shall pay over the amounts so held by him to the trustees herein who shall distribute the same among the creditors of the said bankrupt in the manner provided by law. In the event that said plenary suit be discontinued by said trustees or be dismissed for failure of the trustees diligently to prosecute the same, then the order of such discontinuance or dismissal shall have the same effect as herein provided for a judgment determining said lien of said judgment, levy and execution to be valid. Any order of sale of this Court, however, to have the effect herein provided for, must be made only after five days notice in writing served upon Herman Goldman, attorney for Taubel-Scott-Kitzmiller Co., Inc.

9/19/22. Julian W. Mack, Circuit Judge.

101 United States District Court, Southern District of New York.

[Title omitted.]

Affidavit of No Opinion.

STATE OF NEW YORK,
County of New York, ss:

Walter E. Ernst, being duly sworn deposes and says: That I am one of the attorneys for the petitioners herein. No opinion or memorandum was given by the Judge in this case. Walter E. Ernst.

Sworn to before me this 20th day of October, 1922. Daniel G. Brennan, Notary Public. Bronx County Clerk's No. 121. Bronx County Register's No. 308. New York County Clerk's No. 748. New York County Register's No. 4542. Kings County Clerk's No. 192. Kings County Register's No. 4855. Commission expires March 30th, 1924.

102 United States District Court, Southern District of New York.

[Title omitted.]

Stipulation as to Transcript.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

Dated, New York, October 30, 1922. Olcott, Bonynge, McManus & Ernst, Attorneys for Petitioners. Herman Goldman, Attorney for Judgment-Creditor.

103 United States District Court, Southern District of New York.

[Title omitted.]

Clerk's Certificate.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 30th day of October, in the year of our Lord one thousand nine hundred and twenty-two, and of the Independence of the said United States the one hundred and forty-seventh. Alex. Gilchrist, Jr., Clerk. (Seal.)

104 United States Circuit Court of Appeals for the Second Circuit.

Before Hon. Charles M. Hough, Hon. Martin T. Manton, Hon. Julius M. Mayer, Circuit Judges.

[Title omitted.]

Petition to Revise Order in Bankruptcy Entered in the District Court of the United States for the Southern District of New York.

Opinion.

The Cowen Company was adjudicated bankrupt upon its own petition on August 25, 1922. Within four months of that date the Taubel Company obtained a judgment against it, issued process to the Sheriff of the County of New York and levied upon certain goods of the Cowen Company on August 15th.

The Sheriff's officers have ever since been in charge and custody of said goods and chattels on the bankrupt's premises. A trustee having been elected and qualified and the estate referred to
105 a Referee, that officer on September 15th issued an order requiring the Taubel Company to show cause before him why the judgment above recited "and the levy upon the execution issued thereunder should not be deemed null and void and why the property affected by the levy and judgment shall not * * * pass to the trustees as a part of the estate of the bankrupt."

This order was returnable September 18th. So far as this record shows no proceedings were ever had under this order and before the Referee, but a motion was made before the Judge then holding the bankruptcy court to set aside the same, and on the 18th of September an order was entered by said Judge directing that the referee's show cause order be "vacated and set aside on the ground that the referee in bankruptcy (is) without jurisdiction to make the same, inasmuch as the rights of said Taubel, etc. Co. cannot be determined in a summary proceeding but only by a plenary suit instituted by the trustees against it." This is the order sought to be revised in the present proceeding. The Court below filed no opinion, but by the order complained of further directed that all action by the Taubel Company or the Sheriff under the execution aforesaid should be stayed until October 9th, within which time the trustees in bankruptcy must "commence a plenary suit" against the Taubel Company. The order also reserved a right in the bankruptcy court after the institution of said plenary suit to direct the sale of the property "free and clear of all liens and encumbrances" and for the retention by the Sheriff of the amount so collected by him "in place and stead of said property * * * until the final determination of
106 such plenary suit by a competent court of ultimate appeal."

The trustees filed this petition to revise and obtained a stay pending this appeal.

Irving L. Ernst for the trustees in bankruptcy.
Elkan Turk for Taubel, etc. Co., respondent.

HOUGH, *C. J.*:

The procedure below was indefensible. The proper referee instituted a proceeding which on its face was plainly within the jurisdiction of the court and of himself as an officer thereof. That jurisdiction was challenged without even responding to the referee's process, and by means of an order to show cause issued by the judge in charge of the bankruptcy court.

This method of defence is in itself undesirable because it converts what ought to be an orderly trial into a conflict of affidavits usually (as in this case) largely irrelevant.

Further the practice is not sanctioned by statute or rule. A referee's alleged errors are properly corrected by petition for review, which may be taken at any stage of the proceeding and cover both matters of fact and of law (Sec. 2 (10).

If this case had come up from the Referee in the proper way, all the material facts would have appeared in that official's certificate or return, instead of in a sprawling mass of affidavits and a cross fire of show-cause orders.

Procedure such as this has never been approved by this court;
In re Wood (278 Fed., 355) merely shows that such bad
107 practice is not absolutely forbidden.

The point in controversy however is plain; Taubel challenged the jurisdiction nominally of the Referee, but really of the District Court, because he asserted that Cowen Co. was solvent ten days before it was adjudicated a bankrupt. Let it be assumed that the respondent (Taubel) alleged facts sufficient to show the assertion more than merely colorable; result is that he demanded a plenary suit within the rules recently restated in Re Marquette (254 Fed., 419).

The contention therefore is that respondent (Taubel) is an adverse claimant. Authoritative definition of this phrase is found in Babbitt vs. Dutcher, 216 U. S., 102 (113), where it was held that if there be a claim of adverse title to property of the bankrupt based upon a transfer antedating the bankruptcy, a plenary suit must be brought in which the adverse claim of title can be tried and adjudicated.

But whatever rights respondent had grow out of the admitted fact of its being an execution creditor with levy made on the bankrupt's property, under the laws of New York. But even after such levy the bankrupt "remained the general owner of the property seized and was entitled by virtue of such ownership to the benefit of its full value. * * * (The bankrupt) unquestionably had a right of action against any person unlawfully interfering with the property while in the possession of the Sheriff * * * This right of action is necessarily subordinate to the right of the Sheriff to maintain an
action to recover damages for a loss occasioned by an injury
108 to his special interest in the property created by levy and possession under legal process." (Scott v. Morgan, 94 N. Y., 508 (516); and see Hotchkiss v. McVicker, 12 John., 403.)

Thus respondents never had either title to or possession of the property levied on. The Sheriff had possession and a lien, i. e. a qualified interest or title sufficient to maintain trover. The fact that the Sheriff, if called into court, would undoubtedly call in the execution creditor to defend him, makes no difference in the legal position.

Doubtless also the Sheriff had a personal or official lien for his fees, &c., but that claim must under existing state statutes be paid in any event; it has not been denied, nor doubted, and is immaterial to the present controversy.

Thus the real question was and is whether the Sheriff could demand a plenary suit because the creditor who set him in motion alleged solvency in the bankrupt at date of levy.

Argument rests on Sec. 67*f*, in that "all levies, judgments, etc. obtained through legal proceedings against a person who is insolvent,

at any time within four months prior to the filing of a petition in bankruptcy" shall be avoided "in case he is adjudged a bankrupt";

We assume that the Referee intended to try the question of solvency or insolvency at date of levy. He followed the practice in this circuit since Re Kenney (97 Fed., 554, aff'd 105 Fed. 897, and again as Clark vs. Larremore, 188 U. S. 486). Nor has the force of these decisions lessened by Re Andre (135 Fed., 736), the query in which case was whether before adjudication the lien of an attachment
109 could be avoided. It is true that in neither of these cases did the execution creditor raise the plea of his debtor's solvency; but in the Kenney case the Sheriff had before petition filed converted the seized goods into money, and that money he owed to the execution creditor. Any more complete title in an adverse claimant, within the ruling in the Babbitt decision, it is impossible to imagine (Re Ransford, 194 Fed., 650 (663) is in accord.)

It has been held however that a claimant whose lien attaches within four months prior to the filing of the petition in bankruptcy and "which is not conditioned by the insolvency of the debtor at the time such lien attached" is entitled to the trial of its claim in a plenary suit because such claim "is excluded from the provisions of Sect. 67*f*". (Martin v. Oliver, 260 Fed., 89 (94). We cannot agree that even a plausible and more than colorable allegation of solvency excludes the whole inquiry from the provisions of Sec. 67*f*. If such exclusion exists, an allegation by a judgment creditor that his lien was obtained more than four months before filing of petition would work the same result; and so would any other denial of the applicability of the section referred to.

The declared intent of this section is that the court shall take possession of the property of the bankrupt "discharged and released" from certain specified levies, liens, &c., unless it is proper to preserve the lien for the benefit of the estate. This result can only be reached by the practice long recognized in this jurisdiction.

Wherever the possession of property is in the trustee, i. e. in the Court, any and all claimants thereto must come into the
110 bankruptcy court to assert and maintain their alleged claims, liens or rights to preference (Re Kellogg, 121 Fed., 333).

The principle of that rule applies here. The bankrupts were not divested of title by the levy; the goods remained the bankrupts' goods subject to a lien; and the personal or official claim of the Sheriff was at all times dischargeable by payment of his fees. Thus the title to the goods which was the bankrupts' became the trustee's, and the possession of the trustee is the possession of the Court; therefore the Court had right to inquire whether the lien was or was not of the kind discharged by Sec. 67*f*.

In effect this doctrine was recognized and applied by the Court below and in the order complained of; for although it declined jurisdiction to inquire into the vital point of solvency, the Court retained absolute control over the goods and over the Sheriff, and in substance required the Sheriff to sell if and when ordered by the Bankruptcy Court, to sell free of the lien which respondent asserted and to hold

the proceeds until a court of competent jurisdiction had established the applicability or non-applicability of Sec. 67*f*.

These directions were necessarily wrong unless the Court through its trustee was entitled to the possession of the goods. It is only by reason of such possession that the court can sell discharged of liens.

We think the lower court was in possession; therefore it had a right to sell free and clear of liens, but by exactly the same reasoning it was entitled to proceed and ascertain the status of the lien
111 of the execution under Taubel Co.'s judgment.

Order reversed with costs and matter remanded for further proceedings not inconsistent with this opinion.

112 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit Held at the Court Rooms, in the Post Office Building, in the City of New York, on the 19th Day of December, One Thousand Nine Hundred and Twenty-two.

Present: Hon. Charles M. Hough, Hon. Martin T. Manton, Hon. Julius M. Mayer, Circuit Judges.

[Title omitted.]

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

Decree.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is reversed with costs and cause remanded for further proceedings in accordance with the opinion of this court.

C. M. H.
M. T. M.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

113 [File endorsement omitted.]

114 **Clerk's Certificate.**

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 113 inclusive, contain a true and complete

transcript of the record and proceedings had in said Court, in the case of Matter of Cowen Hosiery Company, Inc., Bankrupt, David J. Fox, et al., as Trustees, etc., Petitioners, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 26th day of December in the year of our Lord One Thousand Nine Hundred and Twenty-two and of the Independence of the said United States the One Hundred and Forty-seventh. Wm. Parkin, Clerk. [Seal of the United States Circuit Court of Appeals, Second Circuit.]

115 **Writ of Certiorari and Return.**

[Filed Jan. 26, 1923.]

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which David J. Fox et al., Trustees in Bankruptcy of Cowen Hosiery Company, Inc., are petitioners, and Taubel-Scott-Kitzmiller Company, Inc., is respondent, which suit was removed into the said Circuit Court of Appeals by virtue of a petition to revise the order in bankruptcy entered in the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby com-
116 mand you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-third day of January, in the year of our Lord one thousand nine hundred and twenty-three. Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

117 [File endorsement omitted.]

118 United States Circuit Court of Appeals for the Second Circuit.

In the Matter of the COWEN HOSIERY CO., INC., Bankrupt.

TAUBEL-SCOTT-KITZMILLER CO., INC., Petitioner,

against

DAVID J. FOX, EUGENE S. BENJAMIN, and REGINALD P. BOYD, as Trustees of the Cowen Hosiery Co., Inc., Bankrupt, Respondent.

Whereas, the Supreme Court of the United States has heretofore granted the petition of the above named petitioner for a writ of certiorari to review the record in the above cause, and under date of January 23, 1923, issued its writ of certiorari directing the above Court to send to it the record and proceedings in the above cause, a certified copy of which said record and proceedings has heretofore been lodged in said Court by the said petitioner.

Now, therefore, it is hereby stipulated by and between the parties to the above entitled action that the certified copy of the record in the above entitled cause, heretofore filed in the Supreme Court of the United States by the said petitioner, as a part of its petition for a writ of certiorari, may be taken as the return to the writ of certiorari issued by the Supreme Court of the United States, and that when this stipulation may have been filed with the Clerk of the United States Circuit Court of Appeals for the Second Circuit a certified copy thereof may be forwarded by him to the
119 & 120 Clerk of the Supreme Court of the United States as his return to the writ of certiorari issued out of the Supreme Court of the United States on the 23rd day of January, 1923.

Dated, New York, January 25, 1923. Frank J. Hogan, Attorney for Petitioner. Irving L. Ernst, Attorney for Respondent.

121 [File endorsement omitted.]

122 & 123 To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated New York, January 25, 1923. Wm. Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit. [Seal of the United States Circuit Court of Appeals, Second Circuit.]

124 [File endorsement omitted.]

125 [File endorsement omitted.]

188

No. 781

Office Supreme Court, U.
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WM. R. STANSBURY
CLERK

Supreme Court.

OF THE UNITED STATES,

OCTOBER TERM—1922.

TAUBEL-SCOTT-KITZMILLER CO., INC.,
(Respondent below),
Petitioner,

—against—

DAVID J. FOX, REGINALD P. BOYD and EUGENE S. BENJAMIN, Trustees in Bankruptcy of COWEN HOSIERY CO., INC., Bankrupt,
(Petitioners in Revision below),
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

and

BRIEF IN SUPPORT THEREOF.

FRANK J. HOGAN,
HERMAN GOLDMAN,
ELKAN TURK,
MAX A. GELLER,
HARRY G. LIESE,
Counsel for Petitioner.

Notice of Motion.

Supreme Court,

OF THE UNITED STATES,

OCTOBER TERM—1922.

TAUBEL-SCOTT-KITZMILLER CO., INC.,
(Respondent below),
Petitioner,

—against—

DAVID J. FOX, REGINALD P. BOYD and EUGENE S. BENJAMIN, Trustees in Bankruptcy of COWEN HOSIERY CO., INC., Bankrupt,
(Petitioners in Revision below),
Respondents.

Sirs:

PLEASE TAKE NOTICE that upon a certified copy of the transcript of the record herein and upon the annexed petition of Taubel-Scott-Kitzmiller Co., Inc., sworn to the 28th day of December, 1922, we shall move the motion hereto annexed before the Supreme Court of the United States, at the Capitol in the City of Washington, District of Columbia, on Monday, the 15th day of January, 1923, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, and that we shall then and there move

for such further relief in the premises as may be just.

Dated, New York, December 28, 1922.

Yours, etc.,

FRANK J. HOGAN,
Colorado Building,
Washington, D. C.

HERMAN GOLDMAN,
120 Broadway,
New York City.
Counsel for Petitioner,
Taubel-Scott-Kitzmiller Co., Inc.

To:

MESSRS. OLCOTT, BONYNGE, MCMANUS & ERNST,
Attorneys for Trustees-Respondents,
170 Broadway,
Borough of Manhattan,
New York City.

SUPREME COURT
OF THE UNITED STATES,

OCTOBER TERM—1922.

TAUBEL-SCOTT-KITZMILLER CO., INC.,
(Respondent below),
Petitioner,

—against—

DAVID J. FOX, REGINALD P. BOYD and EUGENE S. BENJAMIN, Trustees in Bankruptcy of COWEN HOSIERY CO., INC., Bankrupt,
(Petitioners in Revision below),
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Taubel-Scott-Kitzmiller Co., Inc., a corporation organized and existing under and by virtue of the laws of the State of New Jersey, alleges and respectfully shows to this Honorable Court:

The proceeding which this petition seeks to review is a determination by the Circuit Court of Appeals for the Second Circuit directing a re-

versal of an order of the District Court of the United States for the Southern District of New York, which in effect required the trustees in bankruptcy, if they desired to contest the validity of a judgment entered in favor of the petitioner and the execution levied pursuant thereto, to bring a plenary suit for that purpose and which decided in effect that the Referee in bankruptcy was without summary jurisdiction to determine the validity of the said judgment and the said execution.

The Taubel-Scott-Kitzmiller Co., Inc., the petitioner herein, which for convenience will hereafter be referred to as the "Taubel Company", entered a judgment for the sum of Thirty-nine thousand three hundred sixty-six and 55/100 ($39,366.55) Dollars in the office of the Clerk of the County of New York on August 15, 1922, and on the same day caused an execution to be issued to the Sheriff of the County of New York, who made immediate levy upon the property of the Cowen Hosiery Co., Inc. On the following day, August 16, 1922, a certain creditor filed an involuntary petition against the Cowen Hosiery Co., Inc., alleging insolvency and the granting of preferences as an act of bankruptcy. To this petition the Taubel Company filed a verified answer on the same day in which it denied the insolvency and affirmatively alleged that the Cowen Hosiery Co., Inc., was solvent. This involuntary petition was never brought to issue, although it was immediately noticed for trial by the Taubel Company. On August 22, 1922, the same creditor filed a second involuntary petition in which he again

alleged insolvency and alleged as an act of bankruptcy that the bankrupt had acknowledged its inability to pay its debts. To this petition the bankrupt annexed its consent to be adjudicated a bankrupt. To this second petition the Taubel Company also filed its verified answer denying the insolvency and alleging affirmatively that the Cowen Hosiery Co., Inc., was solvent, and again immediately noticed the second involuntary petition for trial. This involuntary petition again was not proceeded with. On August 25, 1922, the bankrupt filed its voluntary petition resulting in an immediate adjudication, and to this voluntary petition it annexed its schedules of assets and liabilities which upon analysis showed an excess of assets over liabilities. In other words, the petition itself showed solvency within the meaning of the Bankruptcy Act.

The bankrupt, and the creditors acting in concert with the bankrupt, made various motions to oust the Sheriff which, however, were unsuccessful. On September 12, 1922, the respondents above were elected trustees in bankruptcy and on September 15, 1922, obtained an order from Referee Seaman Miller, returnable on September 18, 1922, directing the Taubel Company to show cause why the Sheriff should not be ousted and why the property levied upon should not be freed and released from the lien of the judgment, execution and levy. In the meantime the Sheriff had been restrained by orders of the District Court from proceeding further with the levy, but he remained in possession of the property at the premises previously occupied by the bankrupt.

The Taubel Company then made a motion, returnable before the District Court, to vacate and set aside the order to show cause made by the Referee on the ground that he was without jurisdiction to make the order or hear the matter in a summary manner, and for an order directing that unless the trustees commenced a plenary suit before October 9, 1922, that the Sheriff be relieved from all stays and be permitted to proceed with the execution.

Upon this motion the District Court, Honorable Julian W. Mack presiding, made its order vacating the order to show cause made by the Referee on the ground that he was without jurisdiction to proceed in a summary manner and directing that the trustees commence plenary suit on or before October 9, 1922, failing of which all stays restraining the Sheriff from proceeding with the levy should be vacated. Upon the motion, which resulted in this order, the Taubel Company produced substantial evidence that the bankrupt was solvent on the date when the judgment was entered. It produced the schedules sworn to by the bankrupt showing a condition of solvency. It produced evidence that the bankrupt had testified under Section 21-A of the Bankruptcy Act that the schedules were in error in that over Eighty-five thousand ($85,000) Dollars worth of assets had been omitted. It produced evidence that the testimony of the bankrupt under the examination had shown that the officers of the bankrupt were indebted to the bankrupt-company to the extent of Fifty thousand ($50,000) Dollars. In short, the Taubel Company produced evidence which was

substantial and which was sufficient to satisfy the Judge that the bankrupt upon the date when the judgment was entered was solvent to the extent of close to Two hundred thousand ($200,000) Dollars. In opposition to this very substantial showing the trustees did not even offer a word of proof to show insolvency. Of course the adjudication pursuant to a voluntary petition was entirely meaningless so far as determining either solvency or insolvency.

The determination of the District Court amounts to this——

> *That if a judgment-creditor whose judgment was entered and whose execution was levied within four months prior to the filing of the petition in bankruptcy makes a substantial, as distinguished from a colorable, claim that the bankrupt at the date of the entry of his judgment and the levying of his execution was solvent the validity of his judgment and of his execution can be questioned by a trustee in bankruptcy only in a plenary suit.*

The Circuit Court of Appeals reversing the District Court held that a Referee in bankruptcy and the District Court had jurisdiction to determine the validity of such a judgment. In every other Circuit in which this question has been passed upon, as will be demonstrated by the brief submitted herewith, it has been held that the validity of a lien attaching within four months prior to the filing of a petition could only be

tested in a plenary suit if the lienholder asserted in good faith and upon a substantial showing that the bankrupt was solvent at the time of the attachment of the lien. In the Eighth Circuit this was the holding in the case of *Martin* v. *Oliver*, 260 Fed. 89, and in the case of *Stone-Ordean Wells Co.* v. *Mark*, 227 Fed. 975; and in the Sixth Circuit, *In re Ann Arbor Machine Co.*, 278 Fed. 749. This Honorable Court has never passed upon the point directly in issue, although your petitioner is convinced that from analogous adjudications its determination would be in accordance with the holdings in other Circuits and contrary to the determination in this case by the Second Circuit.

The question which your petitioner therefore desires this Court finally to settle is:

> **If, within four months after the entry of a judgment and the issuance of execution thereon, a petition in bankruptcy is filed by or against a judgment debtor and the judgment creditor asserts a claim supported by substantial evidence that the judgment debtor was on the date of the entry of the judgment and the issuance of execution in a solvent condition, and the trustee in bankruptcy attacks the judgment and execution lien, does the claim of the judgment creditor constitute such adverse claim as can be adjudicated only in a plenary suit or has the bankruptcy court jurisdiction to dispose of the claim in a summary manner.**

The importance of the question here presented cannot be over-emphasized. It is one of jurisdiction. Can the validity of this class of lien be finally determined by a Referee in bankruptcy in summary proceedings or can it only be determined after full hearing before a Court and jury in a plenary suit? If this question be left in a state of uncertainty infinite harm will result. Title to property will necessarily be subjected to doubt, and persons deprived of their rights to personal property in some jurisdictions without due process of law. To illustrate. In almost every State in the Union the entry of a judgment in the office of a County Clerk immediately impresses a lien upon all the real estate of the judgment debtor in that county. If within four months after the entry of such judgment a petition in bankruptcy is filed against the judgment debtor a contest is almost certain to ensue between the judgment creditor and the trustee in bankruptcy. If there remains a body of conflicting decisions as to the proper forum in which this contest is to be decided and the character of proceedings by which the contest is to be adjudicated the result can be only to render insecure and uncertain the title to the property. That insecurity and uncertainty will be avoided only by a final determination of this Court, having application in all States and in all Circuits.

It requires no illustration to demonstrate the disastrous effect to personal property rights which flows from divergence of interpretation in the various Circuits. If the decisions of the Sixth and Eighth Circuits are correct, then under the

ruling in the Second Circuit judgment-creditors governed thereby will henceforth be deprived of their judgment-liens by a summary determination of a tribunal devoid of jurisdiction.

From another standpoint the importance of the question here involved is manifest. The Constitution of the United States, Article I, Section 8, has empowered Congress

> "to establish * * * uniform laws on the subject of bankruptcies throughout the United States".

The Constitution obviously contemplates that the law with respect to bankruptcies should be the same throughout the Union. The mere enactment of the law is not sufficient to insure its uniform application throughout the United States. Obviously to carry out the constitutional intendment the law must receive everywhe.e the same judicial interpretation. So far as the several Circuit Courts of Appeals agree as to the meaning and effect of the Bankruptcy Act there is, of course, no need for this Honorable Court to exert its jurisdiction, but when there is conflict between the various Circuits as to the meaning of the Bankruptcy Act and thus the legislative purpose that there be uniformity is defeated, it is of the highest public moment that this Honorable Court interpose in order to preserve that uniformity of application contemplated by the Constitution.

The opinion of the Circuit Court of Appeals of the Second Circuit was handed down on December 18th, 1922, and the mandate of that Court, contrary to all custom, was issued on the following day, December 19th, 1922.

Petitioner presents herewith its brief in support of this petition.

Wherefore your petitioner respectfully prays that a writ of certiorari out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated a full and complete transcript of the record of all proceedings of said Circuit Court of Appeals in this case, which was entitled in that Court.

In the Matter
of
COWEN HOSIERY CO., INC.,
Bankrupt,

DAVID J. FOX, *et al.*, Trustees in Bankruptcy of
COWEN HOSIERY CO., INC.,
Petitioners,
TAUBEL-SCOTT-KITZMILLER CO., INC.,
Respondent,

to the end that said case may be reviewed and determined by this Court as provided by law and that your petitioner may have such other and further relief and remedy in the premises as to this Court may seem just, and that the said judgment of the Circuit Court of Appeals may be modified by this Honorable Court.

TAUBEL-SCOTT-KITZMILLER CO., INC.,

By RUFUS W. SCOTT,
Petitioner.

FRANK J. HOGAN
HERMAN GOLDMAN
ELKAN TURK
MAX A. GELLER
HARRY G. LIESE
Counsel for Petitioner.

State of New York, }
County of New York, } ss.:

RUFUS W. SCOTT, being duly sworn, deposes and says that he is the Chairman of the Board of Directors of Taubel-Scott-Kitzmiller Co., Inc., petitioner herein; that he has read the foregoing petition and the same is true as he verily believes.

RUFUS W. SCOTT.

Sworn to before me this
28th day of December, 1922.

ANDREW J. ARBUCKLE,
Notary Public,
Kings County.
Clerk's No. 99, Register's No. 4107.
Certificate filed in New York County.
Clerk's No. 258, Register's No. 4202.
Certificate filed in Bronx County.
Clerk's No. 8, Register's No. 79.
Commission expires March 30, 1924.

I hereby certify that I have read the foregoing petition and in my opinion it is well founded and deserves the favorable consideration of this Court.

FRANK J. HOGAN,
Counsel.

UNITED STATES SUPREME COURT,

OCTOBER TERM—1922.

TAUBEL-SCOTT-KITZMILLER CO., INC.,
(Respondent below),
Petitioner,

—against—

DAVID J. FOX, REGINALD P. BOYD and EUGENE S. BENJAMIN, Trustees in Bankruptcy of COWEN HOSIERY CO., INC., Bankrupt,
(Petitioners in Revision below),
Respondents.

BRIEF IN SUPPORT OF PETITION OF TAUBEL - SCOTT - KITZMILLER CO., INC., FOR A WRIT OF CERTIORARI.

POINT I.

The result of the decision of the Circuit Court of Appeals was to destroy uniformity of interpretation of the United States Bankruptcy Act.

Prior to the decision of the Circuit Court of Appeals in this case the decisions of the various Federal Courts were uniform to the effect that a judgment-creditor whose judgment was recovered and whose execution was levied within four months prior to the filing of a petition in bank-

ruptcy against the judgment-debtor could be deprived of his lien only after a plenary suit in the event that he made a substantial as contrasted with a colorable claim that the judgment-debtor was solvent on the date of the entry of the judgment. On this point the decisions of the Sixth and Eighth Circuits were particularly clear. Before citing from these cases, however, the petitioner will, for the convenience of the Court, quote a portion of the Bankruptcy Act which is directly before the Court for its interpretation in this case. Section 67-F reads as follows:

> "That all levies, judgments, attachments or other liens, obtained through legal proceedings against a person *who is insolvent*, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt * * *."

The italicized portion of the Act as above quoted is the cardinal feature of the Act before the Court. The question of whether the bankrupt was insolvent at the date of the fixing of the lien is obviously a question which must be determined in every case where the lienholder asserts solvency. The Sixth and Eighth Circuits, as above stated, have held that if such solvency were asserted in good faith and upon a substantial showing, as distinguished from a mere colorable claim, the lienholder could be deprived of his lien only after plenary suit.

In the case of *Martin* v. *Oliver,* 260 Fed. 89, the Court said:

> "But under this section of the Bankruptcy law the insolvency of the person against whom legal proceedings are taken at the time the levy is made or at the time the lien attaches, and the admission of proof of that insolvency, are indispensable conditions of an avoidance of such a levy or lien.
>
> * * * * * * *
>
> They were and are claiming a lien thereon to secure a valid debt under a levy made seven weeks before the petition in bankruptcy was filed, and are also claiming that the property in their possession was not exempt when levied upon and that Lula M. Oliver (the bankrupt) was not insolvent when the levy was made. McNeill and Martin are, therefore, adverse claimants of their lien and of this property, in the actual possession thereof, within the meaning of the Bankruptcy law; they had and have the right to a trial and adjudication of their claim and to the possession of it in a plenary action, according to the course of the common law, or in a suit in chancery, according to the principles and rules of equity; and neither the Bankruptcy Court nor any of its officers had any jurisdiction or authority as against them summarily, and without any notice or application to the State Court for the delivery of the property, to try or adjudge any of the issues which conditioned the validity of the claims of Martin and McNeill, or summarily to order the receiver of the Chancery Court to deliver that property to Lula M. Oliver, the defendant, in the suit in the State Court.

> *In re Rathman*, 183 Fed. 913, 925-928, 106 C. C. A. 253; *Shea* v. *Lewis*, 206 Fed. 877, 880, 124 C. C. A. 537; *Jaquith* v. *Rawley*, 188 U. S. 620; *in re McMahon*, 147 Fed. 684, 77 C. C. A. 668; *Frank* v. *Vollkommer*, 205 U. S. 521; *Carling* v. *Seymour Lumber Co.*, 113 Fed. 483, 51 C. C. A.; *in re Silberhorn*, 105 Fed. 899; *in re Michie*, 116 Fed. 749; *Bardes* v. *Hawarden Bank*, 178 U. S. 524; *Louisville Trust Company* v. *Cominger*, 184 U. S. 18; *Babbitt* v. *Dutcher*, 216 U. S. 102; *Murphy* v. *Hoffman Co.*, 211 U. S. 562."

The same Court in the earlier case of *Stone-Ordean-Wells* v. *Mark*, 227 Fed. 975, also announced the same ruling where the Court used the following language:

> "One who, prior to the filing of a petition in bankruptcy, has acquired a lien upon the property of the party subsequently adjudged a bankrupt, is an adverse claimant, and is entitled to all the rights and privileges of such a claimant to the same extent as one who has acquired property from such a party (citing cases). Nor is such a claimant who does not fall under the provisions of Section 67F deprived of his right to an opportunity to prosecute or defend his claim in a plenary suit by the fact that his lien was acquired within four months of the filing of the petition in bankruptcy."

In the Eighth Circuit also the law is that the judgment and execution creditor can be divested of his lien only in a plenary suit. Thus in the case of *Ann Arbor Machine Co.*, 278 Fed.

749, where the facts are indistinguishable from those in the case at bar, the Court said:

> "As has already been stated, prior to the filing of the bankruptcy petition, the property involved had been seized under writ of execution by the Sheriff of the State Court, and such property was, therefore, in his possession as an officer of such Court and as an adverse claimant. Whether that condition continued up to the time of the filing of the petition in bankruptcy does not appear, but if it had, there can be no doubt that the right of such Sheriff to retain possession and make proper disposition of such property *could have been determined adversely to him only in a plenary suit brought by the trustee in bankruptcy and not in these summary bankruptcy proceedings.*"

The history of decisions in the Second Circuit upon this question has been rather an unusual one. In the first place there was *In re Kenny*, 105 Fed. 897, which did determine that the bankruptcy court had summary jurisdiction. The *Kenny* case was appealed to this Court where the decision was affirmed in the case of *Clark* v. *Larremore*, 188 U. S. 486. In this Court, however, none of the briefs on either side presented the question of jurisdiction and the Court did not pass upon the question as to whether the bankruptcy court could determine the validity of such liens in a summary manner. In the later case of *In re Andre*, 135 Fed. 736, the Circuit Court of Appeals, for the Second Circuit, took occasion to eliminate *In re Kenny* as a case representative of the law. Judge Lacombe, who

wrote the opinion in the *Kenny* case, appended to the *Andre* case a footnote in which he deprived the *Kenny* case of all standing as an authority. His language was as follows:

> "I concur in the opinion reversing the order of the District Judge. The trustee relies mainly on a prior decision of this Court in *re Kenny* * * * which was affirmed by the Supreme Court under the title of *Clark* v. *Larremore*, 188 U. S. 486 * * *. The argument in the *Kenny* case before this Court was without briefs, and the precise point raised here is not discussed in the opinion. It was taken by certiorari to the Supreme Court, but in none of the four briefs there filed (two by each side) is there any discussion as to the jurisdiction of a Bankruptcy Court to make a summary order directing the transfer of property in the possession of a person holding an adverse claim."

The decision in the case at bar expressly goes back to the theory of the *Kenny* case, thus emphasizing the strong necessity for the interposition by this Court of its power to determine finally the question at issue. It is manifest that a condition should not be permitted to continue in which title to property not alone must be determined under the Bankruptcy Act in a different way in different Circuits but where even in the same Circuit the same rule is not continuously adhered to. Particularly notable is the condition which has existed in the Second Circuit where three times varying rules have been laid down.

The necessity of a decision of this Honorable Court upon the question at issue is more intensified by the probability that the rule adopted in the Second Circuit will be deemed authority in

jurisdictions other than the Sixth and Eighth Circuits, and thus what, to the petitioner, seems an erroneous doctrine, spread and perpetuated.

In the next point the petitioner will, it believes, establish that so far as this Court has considered kindred subjects its determinations seem to require a reversal of the determination of the Circuit Court of Appeals in this case.

POINT II.

Previous decisions of this Honorable Court justify the ruling of the Sixth Circuit and of the Eighth Circuit and are in theory irreconcilable with the determination in this case of the Second Circuit.

The petitioner will not impose on this busy tribunal by quoting from the large number of cases determined by this Court which have passed upon kindred subjects from *Bardes* v. *Hawarden Bank*, 178 U. S. 524 to *Galbraith* v. *Vallely*, 256 U. S. 68. This Court has held substantially that anyone who claim an interest in, title to or lien upon a bankrupt's property and has a substantial showing in support of that lien, interest or title, cannot be cast out except upon a plenary hearing. It is only in cases where one is in possession of the property of the bankrupt either without justification at all or as agent or representative of the bankrupt that summary process lies—except only that if the bankruptcy court is satisfied that the claim of a lienholder is merely colorable and not substantial it may determine in a summary man

ner whether or not there is actual substance behind the claim. The distinction between the class of cases where plenary suit is necessary and the class of cases where summary proceedings will lie was definitely and clearly established in the opinion of this Court in the case of *Babbitt* v. *Dutcher*, 216 U. S. 102, where the following language was used:

> "There are two classes of cases arising under the Act of 1898 and controlled by different principles. The first class is where there is a claim of adverse title to property of the bankrupt, based upon a transfer antedating the bankruptcy. The other class is where there is no claim of adverse title based on any transfer prior to the bankruptcy, but where the property is in the physical possession of a third party or of an agent of the bankrupt, or of an officer of a bankrupt corporation, who refuses to deliver it to the trustee in bankruptcy.
>
> In the former class of cases a plenary suit must be brought, either at law or in equity, by the trustee, in which the adverse claim of title can be tried and adjudicated.
>
> In the latter class it is not necessary to bring a plenary suit, but the Bankruptcy Court may act summarily and may make an order in a summary proceeding for the delivery of the property to the trustee, without the formality of a formal litigation."

Other decisions of this Court which further assure that its view is in support of the rule laid down in the Sixth and Eighth Circuits, are as follows:

> "*Jaquith* v. *Rawley*, 188 U. S. 620;
> *Kelly* v. *Gill*, 245 U. S. 116;
> *Weidhorn* v. *Levy*, 253 U. S. 268";

and, of course,

> "*Bardes* v. *Hawarden Bank*, 178 U. S. 524;
> *Galbraith* v. *Vallely*, 256 U. S. 46."

It therefore appears not alone that the question herein presented is such as requires consideration and determination by this Honorable Court, but that the instant case is one where that question should, in justice, be disposed of.

CONCLUSION.

The petitioner therefore submits that this is a proper case for the issue of a writ of certiorari.

Dated, New York, December 28th, 1922.

Respectfully submitted,

FRANK J. HOGAN,
HERMAN GOLDMAN,
ELKAN TURK,
MAX A. GELLER,
HARRY G. LIESE,
Counsel for Petitioner.

Office Supreme Court, U. S.
FILED
FEB 3 1923
WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM—No. 781 188

TAUBEL-SCOTT-KITZMILLER CO., INC.,
Petitioner,

against

DAVID J. FOX, REGINALD P. BOYD and EUGENE S. BENJAMIN, Trustees in bankruptcy of Cowen Hosiery Company, Inc.,

Respondents.

PETITION AND NOTICE OF MOTION TO VACATE WRIT OF CERTIORARI, OR, IF THAT APPLICATION IS DENIED, TO ADVANCE THE ARGUMENT OF THIS CAUSE.

IRVING L. ERNST,
Attorney for Respondents,
170 Broadway,
New York City, N. Y.

FRANK J. HOGAN,
Colorado Building, Washington, D. C.
HERMAN GOLDMAN,
120 Broadway, New York City,
Attorneys for Petitioner.

Supreme Court of the United States

TAUBEL-SCOTT-KITZMILLER CO., INC., Petitioner, against DAVID J. FOX, REGINALD P. BOYD, and EUGENE S. BENJAMIN, Trustees in Bankruptcy of COWEN HOSIERY CO., INC., Respondents.	Notice of Motion.

SIRS:

PLEASE TAKE NOTICE that upon the annexed petition duly verified, and upon all the proceedings had herein, a motion will be made at a Term of this Court, to be held at the Courtroom in the United States Capital at Washington, D. C., on the 19th day of February, 1923, at the opening of Court or as soon thereafter as counsel can be heard, for an order vacating the writ of certiorari granted in this cause dated January 23rd, 1923, on the ground that the question of law sought to be reviewed thereby is now academic, or in the event that said application of vacatur is not granted, for an order advancing this cause for argument, and for such other and further relief

as to this Honorable Court may seem proper and just.

Dated, New York, January 31st, 1923.

Yours &c.,

IRVING L. ERNST,
Attorney for Respondents,
Office & P. O. Address,
170 Broadway,
New York City.

To
FRANK J. HOGAN, Esq.,
Attorney for Petitioner,
Colorado Building,
Washington, D. C.

To
HERMAN GOLDMAN, Esq.,
Attorney for Petitioner,
120 Broadway, N. Y.

SUPREME COURT OF THE UNITED STATES.

TAUBEL-SCOTT-KITZMILLER CO., INC., Petitioner, against DAVID J. FOX, REGINALD P. BOYD, and EUGENE S. BENJAMIN, Trustees in Bankruptcy of COWEN HOSIERY CO., INC., Respondents.	Petition.

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The petition of David J. Fox, Reginald P. Boyd, and Eugene S. Benjamin, respectfully represents:

That on September 12th, 1922, they were duly elected Trustees in Bankruptcy of Cowen Hosiery Co., Inc., a bankrupt, and duly qualified, and thereafter and ever since have been and now are such Trustees in Bankruptcy.

That on August 15th, 1922, Taubel-Scott-Kitzmiller Co., Inc. (petitioner), entered a judgment in the Office of the Clerk of New York County (N. Y.), against the Cowen Hosiery Co., Inc., in the sum of Thirty-nine Thousand Three Hundred Sixty-six and 55/100 ($39,366.55) Dollars, and on the same day issued execution to the Sheriff of the County of New York, who thereupon levied upon certain assets of the judgment debtor in its place of business #114 East 23rd Street, Borough

of Manhattan, City of New York, but did not remove any of said property.

That on August 16th, 1922, an involuntary petition in bankruptcy was filed against the judgment debtor in the District Court of the United States for the Southern District of New York.

That on August 25th, 1922, the judgment debtor was adjudicated a bankrupt upon its voluntary petition filed on that day, and the matter was then and there referred to Seaman Miller, Esq., Referee in Bankruptcy for the further proceedings under the Acts of Congress relating to bankruptcy.

That on September 15th, 1922, the said Referee in Bankruptcy issued an order to show cause on the petition of the Trustees, directing the petitioner to show cause before him on September 18th, 1922, at 4 o'clock in the afternon, why the judgment entered in favor of the petitioner against the judgment debtor (bankrupt) and the levy upon the execution issued thereon, should not be deemed null and void, and why the property affected by the levy and judgment should not be deemed wholly discharged and released from the levy on same. (Note: this application was made under Section 67f of the Bankruptcy Act). This order to show cause was based upon the petition of the Trustees (respondents) alleging that the bankrupt was insolvent at the date of the entry of the judgment, which was ten days prior to the date of the adjudication.

That on September 16th, 1922, upon the petition of the petitioner, Judge Mack, sitting in the District Court of the United States for the Southern District of New York, issued an order directing the Trustees (respondents) to show cause, return-

able before him on September 18th, 1922, why (among other things) the order to show cause made by the Referee, should not be vacated.

That on September 18th, 1922, upon the return of the order to show cause, Judge Mack granted the application of the petitioner and on September 19th, 1922, an order was entered by Judge Mack directing that the Referee's order to show cause be "vacated and set aside on the ground that the Referee in Bankruptcy is without jurisdiction to make the same inasmuch as the rights of Taubel-Scott-Kitzmiller Co., Inc., cannot be determined in a summary proceeding, but only by a plenary suit instituted by the Trustees against it."

The Trustees in Bankruptcy felt aggrieved by that order and filed a petition in the Circuit Court of Appeals for the Second Circuit, to *revise* the said order of Judge Mack, and after due hearing and deliberation the Circuit Court of Appeals, reversed the order of Judge Mack, and said Circuit Court of Appeals, in its opinion sharply criticized the proceeding in the Court below.

That in the meantime, the business of the bankrupt was continued by the Trustees under orders of the Bankruptcy Court, notwithstanding the fact that the Sheriff of the County of New York, continued his levy under the petitioner's execution on its judgment, and had from two to four custodians in the place of business of the bankrupt, which was ever since September 12th, 1922, continuously in the possession of the Trustees, and all of the property of the bankrupts was in the possession and custody of the Trustees, subject only to the levy of the Sheriff on the petitioner's judgment.

That after the reversal of Judge Mack's order by the Circuit Court of Appeals of the Second Circuit, hearings under the order to show cause issued by the Referee on September 15th, 1922, were commenced and continued from December 21st, 1922, continuously from day to day (Saturday, Sundays and holidays excepted), until January 16th, 1923. All of the evidence offered by the Trustees, was directed to prove the insolvency of the judgment debtor on August 15th, 1922, the date of the entry of judgment. The petitioner, on the other hand offered proof for the purpose of showing that the judgment debtor was insolvent on that date. More than five hundred pages of testimony were taken, and numerous and extensive exhibits offered, and at the conclusion of the evidence and after hearing the summation of counsel, the Referee in Bankruptcy found that the judgment debtor (bankrupt) was insolvent on August 15th, 1922. The referee said in part: "Taking all the facts and circumstances in this case, I have no doubt in my mind that these assets at a fair market value on August 15th, 1922, were much less than the liabilities of the company (the bankrupt) and I find as a matter of fact, from the testimony herein, that at that time, the Cowen Hosiery Co., Inc., was insolvent."

Thereafter, an order was entered by the Referee following the language of Section 67f of the Bankruptcy Act, directing that the judgment in favor of the petitioner against the bankrupt should be deemed null and void and that the property affected by the levy and the judgment should be deemed wholly discharged and released from the same.

That after the entry of the mandate by the Circuit Court of Appeals of the Second Circuit and the entry of an order thereon in the District Court of the United States for the Southern District of New York, the petitioner applied to this Honorable Court for a writ of certiorari, and on January 22nd, 1923, said application was granted. At the time of the application by the petitioner for the writ of certiorari, there had been no finding by the Court of solvency or insolvency, but at the date of the granting of the writ, there had been a finding upon evidence submitted by both sides, that the bankrupt was insolvent at the date of the entry of judgment.

It is respectfully submitted, that in view of that finding, the question to be brought up for review by the record from the Circuit Court of Appeals of the Section Circuit, is academic, inasmuch as the allegation of insolvency made by the Trustees (respondents) in their application to the Referee for an order to show cause why the petitioners's judgment should not be deemed null and void by reason of insolvency, has been abundantly established by the evidence, and it is not to be presumed that another Court will come to any different conclusion from the same evidence.

That immediately after the order of the Referee was entered, decreeing that the petitioner's judgment, was null and void, the petitioner filed a petition to review, pursuant to the General Orders of this Honorable Court relating to bankruptcy. But after this Honorable Court granted the application for a writ of certiorari, the petitioner refused to proceed with argument on its petition for review.

If any errors of law were made by the Referee, they are subject to review by the United States Court for the Southern District of New York. The sole purpose that can be accomplished by the petitioner, if it is entirely successful, will be another trial on the question of insolvency in a plenary suit. The evidence, however, would be the same as on the trial before the Referee, which was as full and complete as any trial in a plenary suit can be, as indicated by the fact that the hearings occupied every business day (excepting Saturdays, Sundays and holidays and possibly one business day) from December 21st, 1922, until and including January 16th, 1923. The proceeding before the Referee was not summary (except in a legal sense), as all witnesses were examined and cross examined at great length, and all the witnesses that either side wished to call, were called and all legal evidence submitted and considered.

If this Honorable Court should determine not to vacate its writ, it is respectfully submitted that this cause be advanced for argument for an early date for the following reasons: The respondents are Trustees in Bankruptcy, who are administering the estate of Cowen Hosiery Co., Inc., for the benefit of all of its creditors and are endeavoring that none should obtain a preference; that the administration of the estate had been interfered with by the presence of the Sheriffs custodians in the place of business of the bankrupt now occupied by the respondents, who are continuing the business of the bankrupt under the orders of the Bankruptcy Court, and that the continued ex-

pense of paying these custodians should be stopped with all convenient speed.

Prior to the filing of the petition in bankruptcy, a creditors' committee was appointed, consisting of the following:

D. J. Fox, representing Columbia Bank, N. Y.

J. P. Oleson, representing First National Bank of Chicago.

R. M. Falkenau, representing Irving National Bank, N. Y.

A. B. Heller, representing B. Edmund David, Inc., N. Y.

Reginald P. Boyd, representing various creditors.

It was the object of this creditors' committee to have the affairs of the debtor liquidated or settled without the expense or delay of bankruptcy proceedings. During the deliberations of this committee, the judgment of the petitioner was entered, and execution issued, and it thereupon became necessary to have a petition in bankruptcy filed immediately to prevent the petitioner from obtaining a preference. The creditors' committee, however, continued to function and made a very careful examination of the assets and liabilities of the bankrupt, met with the bankrupt and its attorneys, and agreed that a composition offer of 57½% would be in the best interest of the creditors, and should be accepted by all of the creditors. The debts of the members of the creditors' committee represent a majority in amount of the obligations of the bankrupt. No action, however, could be taken upon the proposed

composition, by reason of the obstructive tactics of the petitioner who has up to this time, has succeeded in having the Sheriffs custodians remain in the premises of the bankrupt. This petitioner has set itself against all of the other creditors in its endeavor to secure full payment from an insolvent estate, and it has impaired, harassed and impeded the proper and orderly administration of this estate; it has created undue expense which all of the creditors will have to bear; it has delayed the other creditors in receiving dividends or from acting upon the composition offered, for all of which it is respectfully submitted, that in the event that the writ of certiorari is not vacated, this cause be set down for argument for the earliest possible date convenient to this Honorable Court and consistent with the rights of other litigants, for which no previous application has been made, and your petitioners will forever pray, etc.

Dated, New York, January 31st, 1923.

TRUSTEES OF
COWEN HOSIERY CO., INC.,
By EUGENE S. BENJAMIN, Bankrupt,
Petitioners.

Petition.

STATE OF NEW YORK,
CITY & COUNTY OF NEW YORK. } ss.:

EUGENE S. BENJAMIN, being duly sworn, deposes and says: That he is one of the petitioners herein; that he has read the foregoing petition and knows the contents thereof, that the same is true to his own knowledge, except as to the matters stated therein, to be alleged upon information and belief.

EUGENE S. BENJAMIN.

Sworn to before me this
31st day of January, 1923.

WILLIAM POLGLASE,
Notary Public,
Kings County No. 66.
Kings County Reg. No. 4067.
N. Y. County Clerk's No. 176.
N. Y. County Reg. No. 4154.

FILED
FEB 17 1923
WM. R. STANSBU

IN THE

Supreme Court of the United States,

OCTOBER TERM—NO. ~~—~~ 188

TAUBEL-SCOTT-KITZMILLER CO., INC.,
Petitioner,

—against—

DAVID J. FOX, REGINALD P. BOYD and EUGENE S. BENJAMIN, Trustees in bankruptcy of Cowen Hosiery Company, Inc.,
Respondents.

PETITIONER'S RESPONSE TO MOTION TO VACATE WRIT OF CERTIORARI, OR, IN THE ALTERNATIVE, TO ADVANCE CAUSE FOR ARGUMENT.

FRANK J. HOGAN,
Colorado Building,
Washington, D. C.,

HERMAN GOLDMAN,
No. 120 Broadway,
New York City,
Attorneys for Petitioner.

THE COURT PRESS—37 West Street—Bowling Green 1620

IN THE

Supreme Court of the United States,

OCTOBER TERM—NO. 781.

TAUBEL SCOTT-KITZMILLER CO., INC.,
Petitioner,

—against—

DAVID J. FOX, REGINALD P. BOYD and EUGENE S. BENJAMIN, Trustees in bankruptcy of Cowen Hosiery Company, Inc.,
Respondents.

Petitioner's Response to Motion to Vacate Writ of Certiorari, or, in the Alternative, to Advance Cause for Argument.

I.

The Motion to Vacate Certiorari.

This motion is based upon the assertion that the question to be reviewed is now academic. This assertion is (a) shown on the face of the motion to be unfounded, and (b) untrue in fact.

(a)

Subsequent to the decision of the Circuit Court of Appeals which this Court has granted the writ of certiorari to review, and while petition for that writ was here pending, a strenuous effort was made by the trustee-respondents to rush proceedings in the District Court to a conclusion

and thereby make moot the question which this Court had been petitioned to review. We will not here review the indecorous methods by which it was sought to attain that end. During that time and in the course of that effort the Referee in Bankruptcy, in summary proceedings, closed the taking of testimony as regards the solvency or insolvency of the Cowen Hosiery Company at the time when the petitioner obtained judgment against that Company; attempted, in those proceedings, to decide that the Company was at that time insolvent; and ordered that its property on which the Sheriff of the County of New York had levied should be deemed wholly discharged and released from that levy and judgment. But, as shown by the pending motion (page 7), immediately there was filed in the District Court below a petition to review the Referee's order, pursuant to the general orders of this Court relating to bankruptcy, and the District Court, obviously recognizing the propriety of so doing, stayed all further proceedings to await action of this Court on the then pending petition for the writ of certiorari. By the motion itself it is now asserted that the question to be reviewed has become academic because, and simply because, the respondent is of opinion that upon trial of a plenary suit in a court of proper jurisdiction, it is not probable that that tribunal would reach a conclusion different from that reached by the Referee in the summary proceedings below, final action in which is still to be had. That this is the sole basis for claiming that the question has become "academic" will be verified by reference to page 7 of the motion. In other words, it is asserted, with apparent seriousness, that an *undecided*

question, now pending in the Court below, which is open for determination in accordance with the final directions of this Court in this cause, is moot and academic because respondents do not believe that a different tribunal in a proper proceeding will reach a conclusion different from that which the Referee in an improper proceeding announced in this case. This Court granted its writ to determine whether the question of solvency was triable by summary proceedings before a Referee in Bankruptcy or by a plenary suit instituted by Trustees in Bankruptcy for that purpose. Respondents ask the Court to vacate the writ thus granted because it "is not to be presumed" that the determination of the issue would be any different in a plenary suit than in a summary proceeding. What the proper procedure should be is now the subject of conflicting decisions in different circuit courts of appeal. This Court by the issuance of its writ of certiorari herein has indicated the importance of uniformity of decision upon that question. The suggestion that the Court should now vacate the writ for the reason above discussed is, we respectfully submit, patently frivolous.

(b)

When this honorable Court issued its writ of certiorari in this cause, disposition of the matter to determine which the writ was issued was pending in the District Court, Southern District of New York, before District Judge John C. Knox. After this Court had granted the writ of certiorari the attorney for respondents endeavored to have the District Court proceed to make

effective the Referee's order that the bankrupt's property be released from the custody of the Sheriff of New York, who had levied thereon to satisfy petitioner's judgment prior to bankruptcy. In other words, an effort was made in the District Court to have that tribunal ignore this Court's writ and proceed even after the record in the cause had been removed from the courts below to this tribunal. As was inevitable this contemptuous action failed, the learned District Court disposing of the effort in a memorandum opinion which appears in the New York Law Journal, February 1, 1923, and is as follows:

> "Out of deference to the writ of certiorari of the Supreme Court which has issued herein, to say nothing of the question of my power now to act in the premises, I shall not presume to pass judgment upon what has transpired before the Referee. Such action upon my part must await the disposition by the Supreme Court of the matters taken before it by this writ. If, as is asserted by the Trustees, certain action should be taken with respect to the bankrupt's property for the preservation of its value, that action must be permitted, if at all, by the Supreme Court.
>
> JNO. C. KNOX,
> U. S. D. J."

We submit that the foregoing amply disposes of the utterly unfounded suggestion that the question to be reviewed by this Court under its writ of certiorari is now academic. It is pending. It has not been disposed of. It is as important now as it was when this Court commanded that it be brought to this bar for decision.

II.

The Motion to Advance.

This petitioner submits itself to the orders of this honorable Court as to the time when the questions brought here for review upon the writ of certiorari shall be argued. Its counsel is apprised of the crowded condition of this Court's docket and the far-reaching importance of the numerous cases pressing for decision. Counsel believe that it is entirely practicable for the parties to this cause to reduce to an unimportant minimum the costs which respondents allege in their pending motion will be continued while the case is pending in this Court by reason of the Sheriff's custody of certain of the bankrupt company's property. There are entirely practicable means whereby the property levied upon may be economically safeguarded pending final determination of the cause. It has only been the insistence of the respondents that the property levied upon should remain in the premises occupied by the bankrupt, and their refusal to countenance any other disposition thereof that is now causing and has heretofore caused any appreciable custodian's costs. The petitioner is ready to co-operate with respondents in reducing the expense complained of to a minimum, and if respondents continue to refuse to take such entirely practicable action as is here suggested, it is submitted that this Court should not be bothered with the point. There is no merit in the suggestion that the cause should be advanced because its pendency is preventing a composition of creditors.

Petitioner, while entirely willing to present this cause at the earliest practicable date to this Court, does not feel that reasons exist which justify joining in a motion to advance.

III.

Conclusion.

Pursuant to the writ of certiorari the record has already been certified to this Court and is now in the office of its Clerk. Upon that record there will be presented here the important question whether solvency at the time of the rendition of judgment of one who subsequently becomes a bankrupt is to be tried before a court of competent jurisdiction in a plenary suit, as provided by law, or to be determined summarily by a referee in bankruptcy. The determination of that question is necessary by this Court in order to render the laws relating to bankruptcy uniform throughout the United States, and to set at rest the conflict upon that important question which now exists between the decisions of the various Circuit Courts of Appeal.

It is submitted that the motion to vacate the writ of certiorari should be denied.

TAUBEL-SCOTT-KITZMILLER CO., INC.,
Petitioner,

By

FRANK J. HOGAN,
Attorney.

Washington, D. C., February 10, 1923.

FILED
NOV 22 1923
WM. R. STANS
CL

Supreme Court of the United States.

OCTOBER TERM, 1923.—No. 188.

TAUBEL-SCOTT-KITZMILLER CO., INC.,
Petitioner,

—against—

DAVID J. FOX, REGINALD P. BOYD and EUGENE S. BENJAMIN, Trustees in Bankruptcy of COWEN HOSIERY CO., INC.,
Bankrupt.

On writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF OF ARGUMENT ON BEHALF OF PETITIONER.

FRANK J. HOGAN,
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Counsel for Petitioner.

Court Press, N. Y. C.

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Supreme Court of the United States.

OCTOBER TERM, 1923.—No. 188.

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Bankrupt.

On writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF OF ARGUMENT ON BEHALF OF PETITIONER.

Statement of the Case.

The Question Before the Court.

The question presented to the Court for its determination is as follows:

> If, within four months after the entry of a judgment and the issuance of execution thereon, a petition in bankruptcy is filed by or against the judgment debtor, and the judgment creditor asserts a claim supported by substantial evidence that the judgment debtor was, on the date of the entry of the judgment and the issuance of execution, in a solvent condition, and the Trustee in bankruptcy

attacks the judgment and execution lien, does the claim of the judgment creditor constitute such adverse claim as can be attacked only in a plenary suit, or has the bankruptcy court jurisdiction to dispose of the claim in a summary manner?

The Manner in Which This Question is Raised.

The Trustees in bankruptcy (the respondents) obtained an order (Trans., p. 10) directing this petitioner and judgment creditor, whose judgment was obtained within four months of the filing of the petition in bankruptcy, and who had caused execution thereon to be levied upon property of the bankrupt also within four months of the filing of the petition, to show cause before the Referee in bankruptcy why the judgment and the levy thereon should not be deemed null and void, and the property affected by the levy deemed wholly discharged and released, and why the property should not pass to the Trustees as a part of the estate of the bankrupt.

This petitioner and judgment creditor, deeming the Referee without jurisdiction, applied to the District Court for the Southern District of New York, for an order vacating the Referee's order to show cause, and directing that the Sheriff of New York County should be relieved from all restrictions upon his levy, unless the Trustees commenced a plenary suit within a limited time, for the purpose of testing in that manner the validity or invalidity of this petitioner's execution lien. (See order to show cause and petition in support thereof, Trans., pp. 3 to 10, inclusive.)

In support of this application, this petitioner adduced substantial evidence, which will be later discussed, that the bankrupt was, at the date of the entry of the judgment and the issuance of the execution, in an amply solvent condition. The Trustees interposed no answer and

adduced no evidence in opposition, but appeared and argued in opposition thereto (fol. 97, Trans., p. 41).

The District Court, upon consideration of the evidence and of the arguments, made its order on September 18th, 1922, vacating the Referee's order to show cause, as being without jurisdiction, and directed that the various stays theretofore imposed upon the Sheriff to prevent him from selling and disposing of the property, should be vacated unless a plenary suit were started by the Trustees against this petitioner and the Sheriff, on or before October 9th, 1922 (Trans., pp. 40 to 42).

The Trustees in bankruptcy, the respondents here, filed their petition to the Circuit Court of Appeals to revise the order of the District Court (Trans., pp. 1 to 3) and the Circuit Court of Appeals reversed the District Court (at Trans., pp. 43 to 47), and issued its mandate accordingly (Trans., p. 47).

This petitioner then applied to this Court for a writ of certiorari, to have the determination of the Circuit Court of Appeals reviewed, and this Court on January 23d, 1923, duly issued its writ of certiorari, whereupon the record was certified and transmitted to this Court (Trans., p. 49).

The Facts.

This petitioner on August 15th, 1922, entered a judgment against the Cowen Hosiery Co., Inc., in the office of the Clerk of New York County, in an action for goods sold, delivered and accepted, in the sum of $39,366.55. On the same day, execution was duly issued out of the office of the Clerk of the Supreme Court to the Sheriff of New York County, who at once levied execution upon property of the Cowen Hosiery Company, Inc., located at its place of business in New York County. The Sheriff placed custodians in charge of this property, and they

maintained their control thereof at all times which will be referred to in this brief, and at all times referred to in the record.

On the following day, August 16th, 1922, one Malcolm C. Hutchison, as assignee of the Irving National Bank, filed an involuntary petition praying that the Cowen Hosiery Co. be adjudged a bankrupt (Trans., p. 12). In this petition, Hutchison disclaimed all knowledge of the value of the assets, but stated that they "probably aggregate $150,000.00." On the same day, this petitioner, as a creditor, filed an answer to this involuntary petition, in which the insolvency of the Cowen Hosiery Co., Inc., was denied and its solvency affirmatively alleged (fol. 11, Trans., p. 5). On the same day, Hutchison further applied to the District Court, Judge Mayer presiding, for an order summarily ousting the Sheriff from the possession of the property of the Cowen Hosiery Co., Inc. (see order to Show Cause and Petition of Hutchison, Trans., pp. 23 to 25). Judge Mayer, contrary to the holding made by him *In the Matter of Popkin*, 240 Fed. 848, issued an order on August 18th, summarily ousting the Sheriff (Trans., pp. 25 and 26, and particularly fols. 60 and 61). The Sheriff of New York County petitioned to have this order of Judge Mayer's revised (Trans., p. 5), and obtained a stay from Circuit Judge Rogers, pending the hearing of such application, and this order of Judge Mayer's was later, on September 6th, 1922, vacated by the consent of those who obtained it (Trans., p. 27).

Apparently despairing of success upon the issue of solvency thus raised by this petitioner's answer to Hutchison's first involuntary petition, he filed a second involuntary petition on August 22d, 1922 (Trans., p. 13), to which was attached a consent to adjudication and a confession of the inability of the Cowen Hosiery Co., Inc., to pay its debts (Trans., p. 14). To this second involuntary petition, and on the very day of its filing, this peti-

tioner again filed a verified answer, denying insolvency and affirmatively alleging that the Cowen Hosiery Company was in a solvent condition (Trans., p. 5).

Fearing, again, to chance a trial of the issue of solvency, the bankrupt, and creditors acting in collusion with the bankrupt (and this collusion is alleged and not denied, Trans., p. 5), filed a voluntary petition in bankruptcy which automatically resulted in the adjudication on August 25th, 1922. There were thus three petitions in bankruptcy filed by and against this company within a period of ten days.

The voluntary petition does not allege insolvency (Trans., pp. 14 and 15). Attached to the voluntary petition were schedules (Trans., pp. 15 to 23), which, as will hereafter be demonstrated, clearly proved that the bankrupt was even on that date in a solvent condition.

In the meantime, examinations under the provisions of Section 21, Subdivision A, of the Bankruptcy Act (Trans., p. 5), had been prosecuted, and the result of these examinations, as we shall hereafter see, was to render the solvency of the bankrupt even more clearly manifest. On the day of the filing of the voluntary petition, the District Court made an order (Trans., p. 37), upon the petition of one of the officers of the bankrupt (Trans., p. 38), restraining the Sheriff from proceeding further under his execution.

On August 30th, 1922, Malcolm Hutchison and certain other creditors applied to the District Court again, for an order ousting the Sheriff, and also (see particularly fol. 67), for an order referring to a Special Commissioner, the question as to whether the Cowen Hosiery Co., Inc., was solvent on the date of this petitioner's judgment (Trans., pp. 28 to 31).

This petitioner resisted this motion, but on the representation of the bankrupt's attorney that the Sheriff was

threatening to remove property from the premises theretofore occupied by the bankrupt, consented to the entry of the order restraining the Sheriff from thus removing the property, and this order was entered on September 1st, 1922 (Trans., pp. 39 and 40).

Upon the hearing of the application to send the question of solvency to a Special Commissioner, the Judge reserved decision, and before the Judge could decide the question as to whether the bankruptcy court, or any Special Commissioner appointed by it, could have jurisdiction of such controversy, the attorneys who made this motion, and who later represented the Trustees, withdrew the motion, and thus prevented the determination of the question of jurisdiction at that time (Trans., p. 9).

On September 12th, 1922, the respondents here before the Court were elected Trustees and qualified as such (Trans., p. 7). Almost immediately upon their election and on September 15th they applied for an order to show cause to the Referee, which gives rise directly to the proceeding which has been certified to this Court (Trans., p. 10).

This order to show cause, therefore, constituted the third atempt to oust the Sheriff of his levy, and to deprive this petitioner of its lien in a summary manner. Upon the first two occasions, by consenting to the vacation of Judge Mayer's order, and by withdrawing the motion before Judge Mack, the opponents of this petitioner have prevented the question from arising in an orderly manner. It is to be here noted that this petitioner had at no time appeared in the bankruptcy proceedings and was not a party thereto. It is to be further noted that the order to show cause, made by the Referee on September 15th (Trans., p. 10), which, as we have stated, is the order leading directly to this appeal, does **not** direct process of any court to be served upon this petitioner, and indeed,

the order itself was required to be served only upon the attorney for this petitioner, who had not appeared in the bankruptcy proceeding, and had only appeared specially when the lien of this petitioner's execution was attacked.

This petitioner thereupon applied to the District Court for its order to show cause to vacate the Referee's rule, and to direct that unless the Trustees should promptly proceed with a plenary suit to test out the validity of this petitioner's lien in a court of competent jurisdiction, the orders of August 25th and September 1st, 1922 (Trans., pp. 37 and 39, respectively), which restrained the Sheriff from disposing of the property, should be vacated; thus leaving this petitioner free to satisfy its judgment out of the proceeds of the levy.

This petitioner, in support of this order to show cause, adduced substantial evidence demonstrating the solvency of the Cowen Hosiery Co., Inc., at the date of the levy, and the Trustees produced no evidence whatsoever in opposition.

The evidence adduced by this petitioner will be the subject of consideration in a moment. Suffice it here to say that the District Court was satisfied that this petitioner's claim was real and not colorable, and determined that the Referee's rule should be vacated, and that a plenary suit alone could test the validity of the execution lien. As a matter of protection for the other creditors of the estate, the judge directed that, as a part of any general sale of the bankrupt's assets, the assets levied upon by the Sheriff might also be sold by the Sheriff and the proceeds held by him, in place and stead of the chattels held by him under the levy (Trans., pp. 40 to 42).

It was this order that the Circuit Court of Appeals reversed, holding that the Referee had summary jurisdiction. This petitioner here respectfully submits that the District Court applied the correct principles of law, and that the Circuit Court of Appeals fell into error.

Specification of Error by the Circuit Court of Appeals.

The Circuit Court of Appeals erred in holding that the Referee in bankruptcy had jurisdiction to determine the validity of the execution lien of the judgment creditor, whose judgment was entered and execution levied within four months prior to the filing of the petition in bankruptcy, and who asserted the claim, supported by substantial evidence, that the bankrupt at the date when the execution lien became fixed, was in a solvent condition; and in holding that a plenary suit was not required for the purpose of testing out the validity of such a lien.

Evidence Adduced in Support of Claim of Solvency.

On the motion to vacate the Referee's rule to show cause, this petitioner adduced before the District Court abundant evidence directly and circumstantially demonstrating the solvency of the Cowen Hosiery Co., Inc.

All of the documents and orders, petitions and affidavits which have been above referred to, were before the court. It was shown to the court and not denied, that on August 8th, 1922, just a week prior to the entry of this petitioner's judgment, the attorneys for the Cowen Hosiery Co., Inc., had made a statement to the creditors of the Cowen Hosiery Co., Inc., that the assets of that company exceeded its liabilities by approximately $60,000 (Trans., pp. 7 and 34).

It was shown to the court that two involuntary petitions had been filed by those acting in connivance with the Cowen Hosiery Co., Inc., and that when the issue of solvency was joined, these petitions were abandoned, and the voluntary petition, not raising the issue of solvency, was filed, resulting in the adjudication.

It was shown to the court that the schedules of the bankrupt filed by it as a part of its voluntary petition, clearly demonstrated the condition of solvency (Trans., p. 7), and to this circumstance, this Court's attention is particularly directed. At first glance, these schedules are so compiled as to give the impression of insolvency; so (Trans., p. 22) a summary of the bankrupt's debts shows an aggregate of $284,669.41, whereas the aggregate of its assets appeared to be only $238,989.48, a deficit of $45,679.93 (Trans., p. 23). This deficit, however, is apparent and not real, as a closer scrutiny convinces, Schedule A-2 (Trans., p. 16), shows debts amounting to $202,049.95, against which there are securities to the extent of $96,287.83. The amounts of these securities are not deducted from the debts. These securities are, $75,000 accounts receivable, which were pledged for loans, and $21,287.83 deposits in creditor banks. Nevertheless, in Schedule B-3 (Trans., p. 20), under Accounts Receivable, we find again that this $75,000 of assigned accounts are deducted, so that the assets included by way of accounts receivable amount only to $8,071.42. So also, under deposits of money in banking institutions and elsewhere, we find that the deposits in the creditor banks are not included. The result is that these very valuable assets aggregating over $96,000 have neither been deducted from the debts, for which they stand as security, nor have they been included as assets. Hence the apparent deficit of $45,679.93 is at once converted into a surplus of $50,607.90.

The court was further shown (at Trans., pp. 7 and 8) that upon the examination of the bankrupt's officers under Section 21, Subdivision A, those officers had testified that they had omitted, in making up their schedules, merchandise to the extent of some $85,000, and that the merchandise should have been included, not as $125,000 as appears in Schedule B-2 (Trans., p. 19), but should

have been in fact, $210,000. The margin of solvency was thus increased from $50,000 to $135,000.

The court was further shown that the examination of the bankrupt's officers had revealed considerable debts owing to the bankrupt from those officers, with regard to which the schedules are also absolutely silent.

The uncontradicted evidence before the court, therefore, was that the bankrupt, upon the date of the entry of this petitioner's judgment, was amply solvent, and that its assets exceeded its liabilities by a figure between $135,000 and $200,000. There can be no question, therefore, but that the showing of the petitioner, with regard to the bankrupt's solvency, was extremely substantial and could not in any wise be deemed or treated as colorable. In fact, the reversal by the Circuit Court of Appeals did not go upon the proposition that such showing was colorable.

This petitioner respectfully submits that upon the foregoing facts, and upon the discussion as to the law which follow, the question brought before this Court by the writ of certiorari, should be answered in favor of this petitioner.

Argument.

POINT I.

Upon the reasoning employed by this Court in analagous cases, this petitioner's execution lien can be invalidated only as the result of plenary suit and can not be questioned before the Referee in a summary manner.

This petitioner's execution lien has been attacked by the Trustee in Bankruptcy as being null and void under the provisions of Section 67, subdivision (f) of the Bank-

ruptcy Act. As was indicated by the petition for the writ of *certiorari* by which this case was brought to this Court, the specific question here involved has never been definitely passed upon in this tribunal. In another portion of this brief, the holdings of the several circuits will be considered and it is believed it will be there conclusively demonstrated that the holdings in this case by the Second Circuit stand in direct opposition to the rule laid down in the other circuits where the courts have spoken on the subject.

This point is devoted to the argument that, in reason, a plenary suit only can be the proper means of testing the validity of such execution lien, and that, resting upon prior decisions of this Court in analagous cases, such reasoning has its support in authority.

This petitioner's position is correct, as a matter of reason.

When the petition in Bankruptcy was filed by the Cowen Hosiery Company, this petitioner was, through the Sheriff of New York County, in possession of sufficient assets to satisfy its judgment (trans., p. 4) and as a result of this levy it had a lien upon the property thus held. The New York Civil Practice Act provides:

"LIEN UPON PERSONAL PROPERTY.

SECTION 679. PERSONAL PROPERTY BOUND BY EXECUTION. The goods and chattels of a judgment debtor, not exempt, by express provision of law, from levy and sale by virtue of an execution, and his other personal property which is expressly declared by law to be subject to levy by virtue of an execution, are bound by the execution, when situated within the jurisdiction of the officer to whom an execution against the property is delivered, from the time of the delivery thereof to the proper officer to be executed, but not before."

As a result of the filing of the voluntary petition, of course this petitioner did not become a party to the bankruptcy proceedings. *As a matter of fact it never appeared nor consented to the jurisdiction of the Bankrupt Court; nor was any process of that Court at any time served upon this petitioner* so as to make it a party litigant before the Court. The Trustees attempted to bring this petitioner as a party before the Bankrupt Court merely by a Referee's order to show cause (trans., p. 10), and that order to show cause even went so far as to authorize a service on this petitioner by delivery of a copy of the order to show cause upon "the attorneys for the Taubel-Scott-Kitzmiller Co." The Taubel Company had certainly not appeared by attorneys in the bankruptcy proceedings. It seems clear that reason and justice dictate that this petitioner should not, without its consent, be compelled to have its valuable property right in this execution lien questioned in a proceeding to which it is not a party. It would, in reason, be as proper for the Trustee to bring in by order to show cause all persons against whom the bankrupt claimed contract rights prior to the bankruptcy, and thus summarily to adjudicate such contract claims and the defenses thereto. This petitioner was no more a party to the proceeding into which the Trustees thus attempted to precipitate it than is a debtor of the bankrupt or any person against whom the bankrupt asserts contract rights. As a matter of reason, therefore, the only proper method of testing whether the plaintiff should be permitted to keep the lien which it had or whether it should be compelled to yield the property which it held subject to said lien is for the Trustees to commence action for that purpose in a court of competent jurisdiction and by service of proper process.

This petitioner should prevail as a result of analagous authorities.

(a) UNDER THE BANKRUPT ACT OF 1867.

Attempts on the part of Trustees summarily to dispose of adverse claims before the Referee in Bankruptcy were made prior to the adoption of the present Bankrupt Act, and soon after the enactment of the Bankrupt Act of 1867. It seems appropriate, before entering into a consideration of the cases under the Act of 1867, to set forth the pertinent language of that Act, which appears in Section 2:

> "SECTION 2. AND BE IT FURTHER ENACTED, That the several circuit courts of the United States within and for the districts where the proceedings in Bankruptcy shall be pending shall have a general superintendence and jurisdiction of all cases and questions arising under this Act; and, except when special provision is otherwise made, may, upon bill, petition, or other proper process of any party aggrieved, hear and determine the case as a Court of Equity.
>
> The powers and jurisdiction hereby granted may be exercised either by said court, or any Justice thereof, in term time or vacation.
>
> Said circuit courts shall also have *concurrent jurisdiction* with the district courts of the same district, of all suits at law, or in equity, which may or shall be brought by the assignee in Bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferrable to or vested in such assignee;
>
> But no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest, touching the property and rights of prop-

> erty aforesaid, in any court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued, for or against such assignee: *Provided*, that nothing herein contained shall revive a right of action barred at the time said assignee is appointed."

Of course, inasmuch as the Act of 1867 did not contain a section identical with Section 67, subdivision (f), direct authority on the question of jurisdiction is lacking. Yet this Court has spoken so clearly upon the principles involved as to furnish substantial authority for this petitioner's position. The cases to which reference will be made under this head, it will be shown, have received confirmation and approval from this Court since the adoption of the present Bankrupt Act.

In the case of *Smith* v. *Mason*, 14 Wall. 419, the bankrupt had, prior to the filing of the petition in bankruptcy, transferred certain property to one who claimed to be his creditor, and who claimed that he received the property in satisfaction of his debt. The Trustee obtained a rule to show cause from the Referee in Bankruptcy whereby the Trustee sought to compel the creditor to submit his contentions to summary determination before the Referee in Bankruptcy. Such a proceeding, this Court held, deprived the creditor of that due process of law to which he was entitled. Mr. Justice Clifford, delivering the opinion of the Court, said (pp. 432-3):

> "Special provision is made for the revision in the Circuit Court of controversies like the one exhibited in this record, and the Court is of the opinion that such causes can not be commenced by a petition for a rule to show cause, as in this case, nor be determined in a summary way by the District Court sitting in Bankruptcy, without due process of law. Cases of the kind before the Court

fall directly within the third clause of the section under consideration, and must, in the judgment of the Court, be determined by a suit in equity or an action at law, as the case may be; and where an action at law is the proper remedy the parties are entitled to a trial by jury if the value in controversy shall exceed Twenty Dollars. Concurrent jurisdiction in such cases, it must be conceded, is vested in the Circuit and District Courts, and it is equally clear that either party, where the proceeding is correct, may remove the cause, in a proper case, when it has proceeded to final judgment or decree, into the Supreme Court for re-examination, as provided in other causes outside of the Bankrupt Act.

* * * * * * * * * *

Equity would certainly have jurisdiction in such a case, as in that mode of proceeding all the parties could be brought before the Court. Extended remarks in respect to the decree in the case appears to be unnecessary, as it is as clear as anything in legal decision can be that the interveners could not claim to divest the appellant of his interest in the funds by becoming parties to a rule like the one before the Court, nor in any other manner than by due process of law.

* * * * * * * * * *

Strangers to the proceedings in Bankruptcy, not served with process, and who have not voluntarily appeared and become parties to such a litigation, *can not be compelled to come into Court under a petition for a rule to show cause*, as in this case; nor is the exercise of such a jurisdiction necessary, as the third clause of the second section of the Bankrupt Act affords the assignee a convenient, constitutional and sufficient remedy to contest every adverse claim made by any person to any property or rights of property transferrable to, or vested in, such assignee."

An even more pertinent authority under the earlier Bankrupt Act is the case of *Marshall* v. *Knox*, 16 Wall.

551. In that case, the Sheriff, pursuant to a process somewhat analagous to distraint for rent, had seized certain of the tenant's property at the instance of the landlord, and held this property subject to the lien created by the Louisiana statute. The seizure took place on January 6, 1868, and on January 15, 1868, the tenant filed a voluntary petition in bankruptcy. The subsequent proceedings as narrated in the official reporter were as follows:

> "The controversy in this case arose from the proceedings undertaken by the assignees to take the property aforesaid out of the hands of the Sheriff, and to dispose of it under the orders of the Bankrupt Court. They first obtained from the Court a rule upon the lessor and the Sheriff to show cause why they should not deliver up the property to the assignees, alleging that various creditors of the bankrupt claimed a privilege on the property, and that it was necessary for the proper adjustment of all claims, privileges, and liens, that the possession should be surrendered to the assignees, to be subject to the Bankrupt Court. The lessor contested this rule, stated his own rights and proceedings, and claimed possession of the property through the Sheriff, for the purpose of selling the same to raise the amount of his rent. The rule, however, was made absolute, without, so far as appeared, any other proof on the subject."

This Court held that such proceedings had deprived the lessor of his property without due process of law, inasmuch as the Referee could not lawfully make the determination which he had attempted to make and that the lessor was entitled to a trial of the issues in a plenary suit instituted by the service of the proper process upon him. The language of Mr. Justice Bradley, who delivered

the opinion of the Court, clearly enunciates this rule (pp. 555 and 556):

> "The case here, then, depends on the question whether the District Court had jurisdiction to proceed by rule as it did. The goods, it has been seen, were in the custody of the Sheriff, under a writ of provisional seizure, and held as a pledge for the rent of the lessor. The seizure had been made before the Bankruptcy. The landlord claimed the right thus to hold possession of them until his claim for rent was satisfied. This claim was adverse to that of the assignee. The case presented was one of conflicting claims to the possession of goods; and the Sheriff had present possession for the benefit of the lessor. *Neither the Sheriff nor the lessor was a party to the proceedings in Bankruptcy. No process had been served upon them to make them such. They were not before the Court; and the Court had no control or jurisdiction over them.*
>
> * * * * * * * * * *
>
> Could such a rule be characterized as due process of law?
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> * * * * * * * * * *
>
> If, therefore, adverse claims to property could be decided by the summary action of the District Court, not only would the party claiming adversely to the assignee be deprived of a trial without due process of law, but he would be without appeal.
>
> * * * * * * * * * *
>
> We think that it could not have been the intention of Congress thus to deprive parties claiming property, of which they were in possession, of the usual processes of the law in defense of their rights."

The Court then proceeded to deal with a contention, which was urged with much zeal before the Circuit Court of Appeals by the Trustees in the case here at bar. The

Trustees contended inasmuch as the ownership of the goods seized by the Sheriff was in the bankrupt, the Sheriff and this petitioner, by virtue of the Sheriff's Act, could not obtain a right adverse to the Trustees. Such contention was adequately disposed of by Mr. Justice Bradley's opinion (p. 557):

> "But it may, with some plausibility, be said that, as the property in this case is conceded to be in the bankrupt, and the question has respect only to the right of possession under the lien, the District Court, which has express jurisdiction of the 'ascertainment and liquidation of liens and other specific claims' on the bankrupt's property, might properly assume control of the property itself. The claim, however, is to the right of possession, and that right may be just as absolute and just as essential to the interests of the claimant as the right of property in the thing itself, and is, in fact, a species of property in the thing just as much the subject of litigation as the thing itself. It is the opinion of the Court, therefore, that the case is not substantially different from that of *Smith* v. *Mason*. Besides, it has another point in common with that case, upon which a direct adjudication was made therein. The lessor in this case was not a party to the bankrupt proceedings; and in *Smith* v. *Mason* we held expressly that 'strangers to the proceedings in bankruptcy, not served with process, and who have not voluntarily appeared and become parties to such litigation, can not be compelled to come into Court under a petition for a rule to show cause.'
>
> "The Court is of opinion, therefore, that the District Court proceeded without jurisdiction in compelling the lessor and the Sheriff, under a rule to show cause, to deliver up possession of the goods in question to the assignee."

The Court then, in considering the nature of a process under which the property had been seized, held such

process analogous to a writ of execution and by its language clearly indicated the disposition which would be made of such case as is here at bar (p. 559):

> "Such a case is similar to that of an execution, in reference to which it has been properly held that where the levy is made before the commencement of proceedings in bankruptcy the possession of the officer can not be disturbed by the assignee."

The full availability of the cases discussed under this head as authority under the present Bankrupt Act is maintained by the language of this Court in the case of *First National Bank of Chicago* v. *Chicago Title & Trust Company*, 198 U. S. 280, where Mr. Chief Justice Fuller said (pp. 288-9):

> "This distinction (referring to the distinction between steps in bankruptcy proceedings proper and controversies arising out of the settlement of estates of bankrupts) existed under the prior bankruptcy law, and the then decisions in respect of a proceeding in bankruptcy and an independent suit are applicable. It was settled that the Bankruptcy Court was without jurisdiction to determine adverse claims to property, not in the possession of the assignee in bankruptcy, by summary proceedings, whether absolute title or only a lien was asserted. *Smith* v. *Mason*, 14 Wall. 419; *Marshall* v. *Knox*, 16 Wall. 551; *In re Bonesteel*, 7 Blatch. 175; * * * *In re Ballou*, 4 Ben. 135, Mr. Justice Blatchford, then District Judge; *In re Marter*, 16 Fed. Cases 857, Mr. Justice Brown, then District Judge.
>
> *The present Act was plainly framed in recognition of the principle of these cases.*"

(b) UNDER THE BANKRUPTCY ACT OF 1898.

As is held by this Court in the case last cited, the Bankrupt Act of 1898 constituted no substantial departure from the provisions of the earlier act insofar as the portions her under consideration are concerned. The provisions with regard to jurisdiction in the Act of 1898 are found in Section 23, which reads as follows:

> "SECTION 23. *Jurisdiction of United States and State Courts*—(a) The United States Circuit Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between Trustees as such and adverse claimants concerning the property acquired or claimed by the Trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted, and such controversies had been between the bankrupts and such adverse claimants.
>
> (b) Suits by the Trustee shall only be brought or prosecuted in the Courts where the bankrupt, whose estate is being administered by said Trustee, might have brought or prosecuted them, if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, *except suits for the recovery of property under Section 60, Subdivision b, and Section 67, subdivision e, and Section 70, subdivision e.*
>
> (c) The United States Circuit Courts shall have concurrent jurisdiction with the Courts of Bankruptcy within their respective territorial limits of the offenses enumerated in this Act."

The distinction between proceedings in bankruptcy and controversies at law and in equity is thus clearly

carried forward into the present statute. The provisions of Section 67, subdivision *f*, which is the specific section under which this petitioner's lien was attacked below, will be hereafter quoted in full at a point where its specific provisions will be considered. Suffice it here to say that subdivision *f* forms a portion of Section 67, which is devoted to the subject of liens generally and the conditions under which such liens may be nullified and the property subject thereto rendered available to the creditors of the bankrupt. The authorities to which attention will be called determine the tribunal and the proceedings which are necessary to a determination of the validity of liens under other subdivisions of Section 67, in order to assure the lien claimants that their rights shall not be attacked without due process of law.

The foundation of all the cases under the present bankrupt act is the case of *Bardes* v. *Hawarden Bank*, 178 U. S. 524, where a transfer of property within four months prior to the filing of the petition was attacked under subdivision *e* of Section 67. The Trustee in Bankruptcy attempted to attack this transfer by proceeding in the Bankrupt Court. The transferee objected to the jurisdiction and this Court on appeal sustained the position of the transferee, in an opinion to which all later cases on the subject have uniformly referred. Mr. Justice Gray, writing for the Court, cited and approved earlier holdings under the Act of 1867 as still being authoritative expression, saying (p. 532):

> "It was also repeatedly held by this Court that the right of an assignee in bankruptcy to assert a title in property transferred by the bankrupt before the bankruptcy to a third person, who now claimed it adversely to the assignee, could only be enforced by a plenary suit,

> at law or in equity, under the section section of the Act of 1867; and not by summary proceedings under the first section thereof, notwithstanding the declaration in that section that the jurisdiction in bankruptcy should extend 'to the collection of all the assets of the bankrupt' and 'to all acts, matters and things to be done under and in virtue of the bankruptcy' until the close of the proceedings in bankruptcy. *Smith* v. *Mason, supra* (1871), 14 Wall. 419; *Marshall* v. *Knox* (1872), 16 Wall. 551-7; *Eyster* v. *Goff* (1875), 91 U. S. 521-5."

The Court then proceeded, after a consideration of the provisions of the recently adopted Act of 1898, to hold that jurisdiction of a proceeding to set aside a transfer as being invalid under Section 67, suvdivision *e*, was vested only in the State Court, "unless by the proposed defendant's consent." The language of the Court was as follows (p. 539):

> "2d. The District Court of the United States can, by the proposed defendant's consent, but not otherwise, entertain jurisdiction over suits brought by Trustees in Bankruptcy to set aside fraudulent transfers of money or property, made by the bankrupt to third parties before the institution of the proceedings in bankruptcy."

It should, of course, be pointed out that after the decision of *Bardes* v. *Hawarden Bank, supra,* Section 23 of the Bankrupt Act was amended so as to make the defendant's consent to a suit in the Federal Court unnecessary in suits brought under subdivision *e* of Section 67. The amendment, however, was not extended so as to include subdivision *f* of Section 67. It follows, therefore, that controversies under subdivision *f* of Section 67 are today in exactly the same legal position as were controversies under subdivision *e* of Section

67 at the date when *Bardes* v. *Hawarden Bank, supra,* was decided, and that, therefore, the State courts alone have jurisdiction, in the absence of the proposed defendant's consent.

In the case of *Louisville Trust Company* v. *Comingor,* 184 U. S. 18, an assignment for the benefit of creditors had been followed by the filing of a petition in bankruptcy. Prior to the filing of the petition, the assignee for the benefit of creditors had applied certain of the estate moneys in the payment of attorney's fees and expenses, as well as to the payment of his own commissions. The Trustee in Bankruptcy, by an order to show cause issued by the Referee, sought to bring in the assignee for the benefit of creditors and compel him to turn over funds which he had thus paid out and applied to his commissions, and an order directing him so to pay over was actually entered by the Referee. In the attempt to render such a summary proceeding effective the assignee for the benefit of creditors had been named as a party to the bankruptcy petition. This Court, when the matter came before it, affirmed the decree of the Circuit Court of Appeals which reversed the order of the District Court, directing the assignee to pay over, holding that the naming of the assignee in the bankruptcy petition was unavailing and determined that only a plenary suit could bring about an adjudication of the assignee's rights in accordance with due process of law. The Court, by Mr. Chief Justice Fuller, said (p. 24):

> "He thus asserted a claim to each of these sums adversely to the bankrupt, and as outstanding when the petition in bankruptcy was filed, and these claims were in fact passed upon by the Referee and the District Judge as being adverse. This brought the controversy within

the ruling in *Bardes* v. *Bank*, 178 U. S. 524, and the questions attempted to be litigated before the Referee and in the District Court as to the allowance of the two amounts could only be raised in the District Court by consent, and then only by plenary suit. If the jurisdiction of the District Court was not consented to, then a State Court, under the circumstances of this case, was the proper forum and the matters in dispute were to be disposed of these * * *.

As we understand the record, the petition in bankruptcy set up no cause of action and prayed no special relief against Comingor, and he was apparently made a defendant because adjudication would put an end to further action by him as assignee. Clearly, as the Circuit Court of Appeals points out, it would be inadmissable to permit creditors to deprive an assignee of his right to have his claims adjudicated by the proper court and in the customary mode of proceeding, by the device of making him a party to the petition for an adjudication, and so attempting to bring him into the case for all purposes. Nor in this matter was any petition by the trustee, or by any other person, filed against Comingor to recover these sums, and the orders were entered by the Referee on the record as it stood, so that there was no pretense whatever of a plenary suit in that court, in form or in substance.

The proceeding was purely summary. The determination of the merits on the facts was not upon a revision by appeal or writ of error under the bankrupt law. If Comingor had been entitled to a trial by jury, he could not have obtained it as of right. The collection of the amounts found due would be enforceable, not by execution but by commitment.

'We think that it could not have been the intention of Congress thus to deprive parties claiming property, of which they were in possession, of the usual process of law in defense of their rights.' *Marshall* v. *Knox*, 16 Wall. 556; *Smith* v. *Mason*, 14 Wall. 419."

In *Jaquith* v. *Rowley*, 188 U. S. 620, prior to the filing of the petition in bankruptcy the bankrupt had been sued and obtained a third person to furnish bail in the action. To secure such third person he had deposited certain money with him, to recover which the trustee attempted a summary proceeding. The trustee filed a petition in the District Court praying an order directing this third person to surrender to him the property delivered to the third person by the bankrupt. Mr. Justice Peckham, writing for this court, used the following language (pp. 623-4):

> "To extend such a jurisdiction over an adverse claimant would be within the prohibition of Section 23, (a) and (b), whether such jurisdiction were exerted by an action strictly so-called or by a summary application to the Court in Bankruptcy. It is the exercise of jurisdiction which the section prohibits, and the particular method of procedure in the court is immaterial. The surety in whose hands the money was deposited to indemnify him for his liability on the bail bond was an adverse claimant within the meaning of that section of the Act, and could not be proceeded against in the Bankruptcy Court unless by his consent, as provided for therein. It is not necessary in order to be an adverse claimant that the surety should claim to be the absolute owner of the property in his possession. It is sufficient if, as in the present case, the money was deposited with him to indemnify him for his liability upon the bail bond and that liability had not been determined and satisfied. If the trustee desire to test the question of the right of the surety to retain the money he must do so in accordance with the provisions of the section of the bankrupt law above referred to."

and at page 625:

> "If the trustee has the right to obtain possession of the money from the surety, he must

assert it in accordance with the provisions of Section 23 of the bankruptcy act and not by this summary proceeding in bankrtupcy."

In *Weidhorn* v. *Levy*, 253 U. S. 268, the trustees sought to recover chattels held by a chattel mortgagee in possession. To accomplish this object the trustees followed the peculiar practice of filing a bill in equity for that purpose before the Referee in Bankruptcy. The language of this Court in that case is strikingly appropriate in that it points out the undesirability of leaving to one occupying the office of Referee in Bankruptcy the decision of the important questions involved in adverse claims. Mr. Justice Pitney, in writing the opinion, said (pages 272-3):

> "But in the present instance the controversy related to property not in the possession or control of the court, or of the bankrupt, or any one representing him at the time of petition filed, and not in the court's custody at the time of the controversy, but in the actual possession of the bankrupt's brother under an adverse claim of ownership based upon conveyances made more than four months before the institution of the proceedings in bankruptcy. In order to set aside these conveyances and subject the property to the administration of the court of bankruptcy a plenary suit was necessary (*Babbit* v. *Dutcher*, 216 U. S. 102-113), and such was the nature of the one that was instituted.
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> * * * * * * * * * *
>
> "We find nothing in the provisions of the Bankruptcy Act that makes it necessary or reasonable to extend the authority and jurisdiction of the Referee beyond the ordinary administrative proceedings in bankruptcy and such controversial matters as arise therein and are in effect a part thereof, or to extend the authority of the Referee under the general reference so as to include jurisdiction over an independent and

> plenary suit such as the one under consideration. The provisions of the Act, as well as the title of his office, indicate that the Referee is to exercise powers not equal to or co-ordinate with those of the court or Judge but subordinate thereto, and he becomes the 'court' only by virtue of the order of reference. In the General Orders the word 'proceedings' occurs frequently, but never in a sense to include a plenary suit."

and at page 274:

> "Reviewing the entire matter, we conclude that under the language of the bankruptcy act and of the general orders in bankruptcy a Referee, by virtue of a general reference under order XII (1), has not jurisdiction over a plenary suit in equity brought by the trustee in bankruptcy against a third party to set aside a fraudulent transfer or conveyance under Section 70-e, and affecting property not in the custody or control of the Court of Bankruptcy."

In *Galbraith* v. *Vallely*, 256 U. S. 46, the question before the Court was almost identical with that considered in the *Comingor* case. Whether a trustee in bankruptcy might by summary proceedings obtain property held by an assignee for the benefit of creditors under an assignment made prior to the filing of the petition in bankruptcy, was answered by this Court when it again held that summary proceedings would not lie but that a plenary suit was necessary.

The foregoing cases are illustrative of the trend of the decisions of this Court which, without exception, require due process of law as applied in a plenary suit in order to divest one holding property adversely to the trustee of the general or special property in assets to which the trustee lays claim.

Rule with regard to colorable claims.

Since the case of *Mueller* v. *Nugent,* 184 U. S. 1, the courts have applied a doctrine that where one holds property previously vested in the bankrupt under what is referred to as "a colorable claim," the Bankruptcy Court may by summary proceeding require the property to be turned over to the trustee, and a consideration of the extent of this doctrine may not here be amiss. Close examination of the doctrine, however, reveals that it is but another way of stating the well recognized proposition that property which is constructively in the possession of the Bankruptcy Court is dealt with in the same manner as property which is actually in the possession of the Bankruptcy Court. Two cases upon the subject will suffice to render this point manifest. The original case was *Mueller* v. *Nugent* (*supra*). In that case the bankrupt but a few hours before the petition in bankruptcy was filed sold his stock of merchandise and paid the proceeds, together with certain other moneys, to his son, who at once went into hiding. There were only two questions which this Court considered, as appears at page 14 of the report. They were, (1), "has the bankruptcy court power to compel the bankrupt, *or his agent,* to deliver up moneys or other assets of the bankrupt in his possession or that of someone for him, on petition and rule to show cause?"; and (2) "does a mere refusal by the bankrupt or his agent so to deliver up, oblige the trustee to resort to a plenary suit in the Circuit Court or a State Court, as the case may be?".

This Court found, as a matter of fact, that the bankrupt's son "held this money as agent of his father, the bankrupt, and without any claim of adverse interest in himself," and upon that finding the Court held that

it was competent for the Referee to deal with the son by a summary proceeding. This case was interpreted in the later case of *York Mfg. Company* v. *Cassell*, 201 U. S. 253, as holding that the bare refusal to turn over could not conclusively operate to drive the trustee to an action to recover as for an indebtedness or a conversion.

It remained, however, for this Court, in the case of *Babbitt* v. *Dutcher*, 216 U. S. 102, to distinguish clearly between the two classes of cases, the one where there is a true adverse claim, the other where there is but a holding of property for and on behalf of the bankrupt, which thus is constructively within the provisions of the Bankruptcy Court. The pertinent language of Mr. Chief Justice Fuller appears at page 113, as follows:

> "There are two classes of cases arising under the Act of 1898 and controlled by different principles. The first class is where there is a claim of adverse title to property of a bankrupt based upon a transfer antedating the bankruptcy. The other class is where there is no claim of adverse title based on any transfer prior to the bankruptcy, but where the property is in the physical possession of a third party or of an agent of the bankrupt, or of an officer of a bankrupt corporation, who refuses to deliver it to the Trustee in Bankruptcy.
>
> In the former class of cases a plenary suit must be brought, either at law or in equity, by the trustee, in which the adverse claim of title can be tried and adjudicated.
>
> In the latter case it is not necessary to bring a plenary suit, but the bankruptcy court may act summarily and may make an order in a summary proceeding for the delivery of the property to the trustee, without the formality of a formal litigation."

The case here at bar certainly does not come within the class of colorable claims. This petitioner had absolutely no connection with the bankrupt. The property was taken through a hostile seizure by the sheriff. This petitioner asserted that its lien and the sheriff's lien under the execution was a good lien because the bankrupt was solvent on the date when the execution was levied. The importance of this element of solvency requires a consideration of the language of subdivision "f" of Section 67,

> "That all levies, judgments, attachments, or other liens, obtained through legal proceedings *against a person who is insolvent*, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien, shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt. * * *."

From the language of this section it becomes apparent that if the bankrupt was *insolvent* on the date of the levy, this petitioner's lien is bad. On the other hand, if the bankrupt was *solvent* on the date of the levy, then petitioner's lien is good. In the foregoing statement of facts this petitioner has shown the substantial evidence, evidence which was uncontradicted by the trustee, and which it adduced to prove the substantial nature of its adverse claim. We have seen that the schedules show solvency to the extent of about $50,000. We have seen that the testimony of the bankrupt's officers, taken in the involuntary proceedings, demonstrates that the schedules themselves, showing solvency, omitted assets to the extent of at least an additional $100,000. This petitioner is not unmindful

that certain cases have held that it is competent for the Bankruptcy Court to inquire whether the adverse claimant is asserting an adverse claim as a mere cover for withholding possession of property. Thus it was held by the Circuit Court of Appeals of the Second Circuit (the very court to which the writ of certiorari in the instant case was issued), sitting in the case of the *Yorkville Coal Company*, 211 Fed. 619, 620, as follows:

> "The purpose of the preliminary investigation is to find out whether there are any facts which might form a basis of an adverse claim so as to send it to trial in a plenary suit. When the inquiry discloses such facts the purpose of the preliminary investigation is accomplished, and the inquiry should then have been brought to a close. In this preliminary investigation in the Bankruptcy Court there is no right to try the claim upon the merits, to weigh testimony against testimony, and to find certain testimony to be true and certain testimony not to be true. That would be to deny the parties the right to a trial before a jury. * * *
>
> When the Bankruptcy Court undertakes to pass upon the question as to the truth or falsity of the testimony on which the claim rests, it *usurps a jurisdiction which it does not possess, and it assumes to pass on the merits.*"

In the case at bar it is clear that all purposes of preliminary investigation had been satisfied. This petitioner had proved by the documents on file in the office of the Court, the schedules attached to the bankrupt's petition, and by the examination of hostile witnesses, that a solvent condition existed, or at least that there was substantial evidence of such solvency. The order to show cause of the Referee (Trans. page 10) did not propose to examine into the question as to whether

petitioner's claim was real or colorable. It purposed, as the language of the order itself shows, to determine

> "Why the judgment entered in the Supreme Court, New York County, in behalf of the Taubel-Scott-Kitzmiller Co. against the bankrupt on August 15, 1922, for $39,366.55, and the levy upon the execution issued thereunder, should not be deemed null and void, and why the property affected by the levy and judgment should not be deemed wholly discharged and released from the same; and why the same shall not pass to the trustee as a part of the estate of the bankrupt."

This order to show cause, therefore, attempted to bring before the Referee this petitioner, not a party to the proceeding, without due process, for the purpose of determining the validity of its lien. The Referee, as we have seen, was utterly without jurisdiction in the premises.

The language of Subdivision "f" of Section 67 does not extend the jurisdiction of the Referee.

The trustees contended below, and probably will here contend, that the language of Section 67-*f* has the effect of extending the jurisdiction of the Referee. In order to pass upon this point a consideration of the entire language of this subdivision is necessary, and it will be quoted in full, as follows:

> "*f.* That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien, shall be deemed wholly discharged and released from the

> same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the Court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien, shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the Court may order such conveyance as shall be necessary to carry the purposes of this section into effect: Provided, that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, attachment, judgment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

The trustees have seized upon the language "and the Court may order such conveyance as shall be necessary to carry the purposes of this section into effect" as indicating that the Court in Bankruptcy may issue a summary order invalidating an execution lien. Such, it seems manifest, is not the purpose of this language. In the first place, it does not occur in a portion of the Bankruptcy Law dealing with the powers and jurisdiction of the Bankruptcy Court. Resort to extended citation, however, is unnecessary. The portion of the language of the section immediately preceding this sentence has to do with the disposition of the property held under a lien once the lien is declared invalid. The section provides, that if the lien is invalid the property may pass to the trustee, but that if the best interest of the estate require it, instead of having the property pass to the trustee the Court may order that the lien shall be availed of by the trustee, so that any advantage which may inhere in the lien may be availed of by the estate. It is only in connection with such transference of lien from the holder of the lien to the trustee that

the provisions with regard to the Court's making an order have any applicability. In order for the Court to make such an order a valid avoidance of the lien is presupposed. This seems to be the necessary, if not the only, inference to be drawn from the language of the statute. It need only be added that the Court below did not place reliance upon this language in reaching its decision.

POINT II.

Decisions in circuits other than the Second Circuit support this petitioner's position.

In the case of *Martin* v. *Oliver*, 260 Fed. 89, 93, the Circuit Court of Appeals of the Eighth Circuit had before it the question here presented. In that case the Court used the following language:

> "They were and are claiming a lien thereon to secure a valid debt under a levy made seven weeks before the petition in bankruptcy was filed, and are also claiming that the property in their possession was not exempt when levied upon, and that Lula M. Oliver (the bankrupt) was not insolvent when the levy was made. McNeill and Martin are therefore adverse claimants of their lien and of this property, in the actual possession thereof, within the meaning of the Bankruptcy Law; they had and have the right to a trial and adjudication of their claim to and to the possession of it in a plenary action, according to the course of the common law, or in a suit in chancery, according to the principles and rules of equity; and neither the Bankruptcy Court nor any of its officers had any jurisdictio nor authority as against them summarily, and without any notice or application to the State

> Court for the delivery of the property, to try or adjudge any of the issues which conditioned the validity of the claims of Martin and McNeill, or summarily to order the receiver of the Chancery Court to deliver that property to Lulu M. Oliver, the defendant in the suit in the State Court. *In re Rathman*, 183 Fed. 913, 925-928, 106 C. C. A. 253; *Shea* v. *Lewis*, 206 Fed. 877, 880, 124 C. C. A. 537; *Jaquith* v. *Rawley*, 188 U. S. 620; *in re McMahon*, 147 Fed. 684, 77 C. C. A. 668; *Frank* v. *Vollkommer*, 205 U. S. 521; *Carling* v. *Seymour Lumber Co.*, 113 Fed. 483, 51 C. C. A.; *in re Silberhorn*, 105 Fed. 899; *in re Michie*, 116 Fed. 749; *Bardes* v. *Hawarden Bank*, 178 U. S. 524; *Louisville Trust Company* v. *Cominger*, 184 U. S. 18; *Babbitt* v. *Dutcher*, 216 U. S. 102; *Murphy* v. *Hoffman Co.*, 211 U. S. 562."

In the case of *Stone-Ordean-Wells* v. *Mark*, 227 Fed. 975, 978, the same Court used the following language:

> "One who, prior to the filing of a petition in bankruptcy, has acquired a lien upon the property of the party subsequently adjudged a bankrupt, is an adverse claimant, and is entitled to all the rights and privileges of such a claimant to the same extent as one who has acquired property from such a party (citing cases). Nor is such a claimant who does not fall under the provisions of Section 67-*f* deprived of his right to an opportunity to prosecute or defend his claim in a plenary suit by the fact that his lien was acquired within four months of the filing of the petition in bankruptcy."

The trustees contended below, and probably will here contend, that the language "nor is such a claimant who does not fall under the provisions of Section 67-*f* deprived of his right to an opportunity, etc." distinguishes the *Stone-Ordean-Wells* case from the case here at bar, for they say that the present case does fall within Sec-

tion 67-*f*. A close reading of the *Stone-Ordean-Wells* case, however, shows that in using that language the Court meant only that the execution-lien holder could not be deprived of a plenary suit so long as there was any substantial claim that the bankrupt was solvent when the lien was obtained. Any other interpretation would make the holding of that case absolutely meaningless, for if we would assume that it means that a plenary suit could be had only in case the bankrupt had been conclusively proved to be solvent on the date of the obtaining of the lien, then there would be nothing left for a plenary suit to determine. The plenary suit, it must be remembered, under Section 67-*f*, is purely upon the question of solvency or insolvency upon the date when the lien attached, provided, of course, the lien came within the four months' period.

In the Sixth Circuit it was held by the District Court, Judge Tuttle presiding, in the case of *Ann Arbor Machine Company*, 278 Fed. 749, 754, as follows:

> "As has already been stated, prior to the filing of the bankruptcy petition, the property involved had been seized under a writ of execution by the sheriff of the State Court, and such property was, therefore, in his possession as an officer of such Court and as an adverse claimant. Whether that condition continued up to the time of the filing of the petition in bankruptcy does not appear, but if it had, there can be no doubt that the right of such sheriff to retain possession and make proper disposition of such property *could have been determined adversely to him only in a plenary suit brought by the trustee in bankruptcy and not in these summary bankruptcy proceedings.*"

Decisions of other circuits with regard to the proper forum for testing out the validity of liens, other than

execution liens, will not here be cited as authority with regard to those liens is abundant in the decisions of this Court. The purpose of this point is accomplished in demonstrating that courts, other than that of the Second Circuit, which have passed upon this question with regard to execution liens, have differed in their holding from the Circuit Court of Appeals of the Second Circuit in the case at bar.

The next point will be devoted to tracing the numerous changes in the rule which has prevailed from time to time in the Second Circuit.

POINT III.

The Courts of the Second Circuit have vaccilated between the position requiring a plenary suit and that permitting determination in a summary manner.

The history of the decisions in the Second Circuit upon this question has been a most unusual one. The earliest decision in cases of this character was that in the *Matter of Ballou*, 4 Ben. 135 (Southern District of New York). On October 9, 1869, a judgment was entered against Ballou and execution issued thereon, his property being taken on legal process by the sheriff on that day. On October 15, 1869, the petition in bankruptcy was filed. The assignee in bankruptcy filed a petition praying that such lien be declared void. The answer of the judgment-creditor to that petition prayed that the levy under the execution be adjudged a valid lien, and that the assignee be ordered to satisfy the execution out of the proceeds of the sale. Objection was also taken by the judgment-creditor that inasmuch as

the proceeding instituted by the petition of the assignee in bankruptcy was one against a firm claiming an adverse interest touching property, or rights of property of the bankrupt, it was wholly irregular because it sought summarily and by an order to show cause to adjudicate the judgment-creditor's rights. The Court, in an opinion cited by this Court in *First National Bank* v. *Title & Trust Co., supra,* speaking through Judge Blatchford, said:

> "The objection was taken, at the hearing, by the counsel for the firm, that, inasmuch as the proceeding instituted by the petition of the assignee is one against the firm as claiming an adverse interest touching property or rights of property of the bankrupt, transferrable to or vested in the assignee, it is wholly irregular, because it was not brought upon a plenary bill in equity, but by a summary petition and an order to show cause. On the authority of the recent decision made in the Circuit Court for this district, in the case of *in re Bonesteel* (7 Blatchford, C. C. R., 175), this objection must be held to be well taken."

In the first case on the subject, therefore, the ruling in the Second Circuit was in entire accord with this petitioner's position before this Court.

Then came the case of *in re Kenney*, 105 Fed. 897. In that case the judgment-creditor upon being challenged, to use the language of the Court, "appeared, presented testimony, and was heard, and the order appealed from was made and entered." It does not appear that the question of jurisdiction was raised. Nevertheless the claim was disposed of in a summary proceeding and the case has been considered authority for determination of such claims in a summary manner in the Second Circuit. This case was affirmed by this Court

under the title of *Clarke* v. *Larremore*, 188 U. S. 486. In the case before this Court, it should be noted, however, the question of jurisdiction was not raised nor was it passed upon. The Kenney case was deemed authority for summary proceedings in such cases as that at bar, so far as the Second Circuit is concerned, until the case of *in re Andre*, 135 Fed. 736, came before the Circuit Court of Appeals for the Second Circuit. Judge Lacombe, who wrote the opinion of the Circuit Court of Appeals in the *Kenney* case, also sat as a member of the bench which passed upon the *Andre* case. Apparently appreciating that an occasion had arisen upon which the supposedly erroneous doctrine of the Kenney case might be rectified, Judge Lacombe wrote a concurring memorandum (page 739) in which any harm done by the holding in the Kenney case seems to have been effectually removed. His language is as follows:

> "I concur in the opinion reversing the order of the District Judge. The trustee relies mainly on a prior decision of this Court *in re Kenney*, 105 Fed. 897, 45 C. C. A. 113, which was affirmed by the Supreme Court under the title of *Clarke* v. *Larremore*, 188 U. S. 486, 23 Sup. Ct. 363, 47 L. Ed. 555. The argument in the Kenney case before this Court was without briefs, and the precise point raised here is not discussed in the opinion. It was taken by certiorari to the Supreme Court, but in none of the four briefs there filed (two by each side) is there any discussion as to the jurisdiction of a Bankruptcy Court to make a summary order directing the transfer of property in the possession of a person holding an adverse claim."

The *Andre case* remained the law of the Second Circuit until the decision in the case at bar was handed down. In the interim numerous cases have been de-

cided by the Circuit Court of Appeals of the Second Circuit which clearly indicate that that Court has at all times recognized the necessity of plenary suits in kindred cases. Illustrations of this class of cases are *in re Rudnick,* 160 Fed. 903; *in re Yorkville Coal Company,* 211 Fed. 619, and particularly *in re Midtown Contracting Co.,* 243 Fed. 56.

In the last cited case the following very appropriate language was used by the Circuit Court of Appeals of the Second Circuit:

> "The courts have held in numerous cases that a stranger to proceedings in bankruptcy, who sets up an adverse title to property which is claimed by the trustee as assets of the bankrupt, cannot be compelled to submit his claim to adjudication in a summary proceeding in the Court of Bankruptcy, provided his claim is made with the apparent intent of defending it in good faith and is not merely colorable, but is entitled to be heard in a plenary suit."

In that suit Judge Hough, who wrote the opinion of the Circuit Court of Appeals in the case at bar, wrote a dissenting opinion, thus clearly indicating the lack of a uniform rule upon the subject in this Circuit.

Then came the case at bar, *in re Cowen Hosiery Company,* which is now reported at 286 Fed. 351, which again reverts to the doctrine of *in re Kenney* (Trans., page 46 and 286 Fed., at page 353), where Judge Hough said:

> "We assume that the Referee intended to try the question of solvency or insolvency at date of the levy. He followed the practice in this Circuit since *Re Kenny* (D. C.) 97 Fed. 554, affirmed 105 Fed. 897, and again as *Clarke* v. *Larremore,* 188

U. S. 486. Nor was the force of these decisions lessened by *re Andrew*, 135 Fed. 736, the query in which case was whether before adjudication the lien of an attachment could be avoided."

Unquestionably, therefore, as set forth in the petition upon which the writ of certiorari was granted in this matter, the Second Circuit requires the stabilizing influence of a decision in this case from this Court to settle for all time the question as to the forum which has competent jurisdiction to adjudicate the property rights at issue when an adverse claim is asserted by an execution-lienholder. Moreover, as indicated by the dissent in the matter of the *Midtown Contracting Co.*, supra, the doubt as to the proper forum extends to other classes of adverse claims.

This petitioner respectfully submits that the rule applied by this Court in analogous cases, as shown by the citations under Point I, and that the rule applied in identical cases in the Sixth Circuit and in the Eighth Circuit, as demonstrated by the citations under Point II, should be made the law of this case and should be made the law for every Circuit in all questions arising under subdivision "*f*" of Section 67 of the Bankruptcy Act of the United States.

POINT IV.

The property levied upon by the Sheriff on behalf of this petitioner was never in the possession, under the control or in the custody of the Trustees in Bankruptcy, but was at all times in the possession of the Sheriff of the County of New York adversely to the Trustees.

The trustees contended below, and it is assumed will contend here, that by reason of the circumstance that the sheriff did not remove the property seized by him from the loft occupied by the bankrupt, the trustees became possessed of the property in such a way as to render the claim of this petitioner not an adverse claim. In the District Court and in the Circuit Court of Appeals they employed the statement that "the property is still in the possession of the trustees subject to the levy." It is notable, however, that the Circuit Court of Appeals found this fact, as did the District Court, against the trustees and in favor of this petitioner. Thus, the Circuit Court of Appeals said (Trans., page 108):

> "The sheriff had possession and a lien, i. e., a qualified interest of title sufficient to maintain trover."

Before passing to the other consideration mentioned in this regard by the Circuit Court of Appeals, it may not be inappropriate to call the Court's attention to the evidence in the record which would make any other finding incomprehensible.

On August 29, Walter E. Ernst, one of the attorneys for the creditors' committee, who became on September

12th the attorneys for the trustees, swore to a petition in which it is stated (Trans., page 69):

> "That the sheriff of New York County is now in possession and control of the property of the bankrupt at the above address"

and further (Trans., page 72):

> "Seventh. That the reason that this application is brought on by order to show cause instead of the usual notice of motion is that the conduct and action of the sheriff and his deputies now in possession of said premises are such that unless they are ousted immediately the creditors of this estate will suffer irreparable injury."

One of the officers of the bankrupt also swore on August 25th as follows (Trans., page 90):

> "That thereafter an execution was issued upon said judgment to the sheriff of the County of New York, who, on the 15th day of August, 1922, made a levy upon the property of the bankrupt at No. 114 East 23rd Street, in the Borough of Manhattan, City of New York, and the sheriff continues in possession of the property of the bankrupt at the address given above."

So, also, on September 1, 1922, after hearing the presentation of the facts by the attorney for the bankrupt and the attorneys for the creditors' committee, who later became attorneys for the trustees, the Court entered an order on motion of the attorney of the bankrupt, which contained the following provision (Trans., page 39):

> "Ordered. 1. That the sheriff of the County of New York, his deputies, agents, servants or employees be and they severally are restrained and enjoined from removing from the premises of the bankrupt, any property, assets and effects of the bankrupt estate, and the said sheriff, his

> deputies, agents, servants or employees be and they hereby are further restrained from in any way interfering with any of the property, assets and effects of the bankrupt estate, and that the said sheriff, his deputies, agents, servants and employees be and they are further restrained from in any way interfering with any of the property, assets and effects, *except, that they may continue in possession thereof, under the levy heretofore made, and for no other purpose.*"

Therefore, this petitioner has proved again by the sworn statements of hostile interests that the sheriff was in possession, even were that not a common understanding of the effect of a sheriff's levy. The Circuit Court of Appeals, however, took a position with regard to this levy which is not altogether clear. The language of the Court (Trans., page 45), which, however, does not seem to be the basis of its opinion inasmuch as it later clearly relied upon the ruling in *Matter of Kenney*, was as follows:

> "But whatever rights the respondent had growing out of the admitted fact of its being an execution creditor with a levy made on the bankrupt property, under the laws of New York. But even after said levy the bankrupt 'remained the general owner of the property seized and was entitled by virtue of such ownership to the benefit of its full value * * * (the bankrupt) unquestionably had a right of action against any person unlawfully interfering with the property in the possession of the sheriff. * * * This right of action is necessarily subordinate to the right of the sheriff to maintain an action to recover damages for the loss occasioned by an injury to his special interest in the property created by levy and possession under legal process.' (*Scott* v. *Morgan*, 94 N. Y. 508 (516), and see *Hotchkiss* v. *McVicker*, 12 John. 403).
>
> Thus respondents never had either title to

> or possession of the property levied on. The sheriff had possession and a lien, i. e., a qualified interest or title sufficient to maintain trover. The fact that the sheriff, if called into court, would undoubtedly call in the execution creditor to defend him, makes no difference in the legal position."

Thus, apparently, the Court desired to raise the point that the sheriff (although the Referee's rule to show cause is directed to the petitioner) should have opposed the present proceeding rather than a judgment creditor. As appears further, however, also in folio 108, the Court did not base its decision on this point as it proceeded with the following language:

> "Thus the real question was and is whether the sheriff could demand a plenary suit because the creditor who set him in motion alleged solvency in the bankrupt at date of levy."

and the Court then proceeded to hold that even the sheriff would not be entitled to a plenary suit, apparently because general ownership of the property remained in the bankrupt and passed to the trustees. Any such position, of course, is contrary to the decisions of this Court, and reference again may be had here to the language of this Court in *Marshall* v. *Knox*, 16 Wall. 551, where the language of the Court at page 557 is so appropriate that requotation may be pardoned:

> "But it may, with some plausibility, be said that, as the property in the case is conceded to be in the bankrupt, and the question has respect only to the right of possession under the lien, the District Court, which has express jurisdiction of the 'ascertainment and liquidation of the liens and other specific claims' on the bankrupt's property, may properly assume control of the property itself. The claim, however, is to the

> right of possession, and that right may be just as absolute and just as essential to the interests of the claimant as the right of property in the thing itself, and is, in fact, a species of property in the thing just as much the subject of litigation as the thing itself. It is the opinion of the Court, therefore, that the case is not substantially different from that of *Smith* v. *Mason*."

It is important, however, to point out that in the language of the Circuit Court of Appeals above quoted, it relied upon the New York case of *Scott* v. *Morgan*, 94 N. Y. 508, which, so far as any application to the present case is concerned, has been overruled, in the case of *National Park Bank* v. *Goddard*, 131 N. Y. 494, where the Court of Appeals said (p. 505):

> "A further objection is made that the attaching creditor has no right or title in or to the property attached, and so has no standing in a court of equity to raise any question; and we are referred to the language of the late Chief Judge in *Scott* v. *Morgan* (94 N. Y. 508), which described the position of the plaintiff in an execution. As a statement of the legal right of the execution creditor, no fault is to be found with it. The special property in the goods levied upon is in the officer who holds a legal title for the protection of his levy, but he holds it *for the benefit of the levying and attaching creditor who thereby obtains an interest in and a lien upon the property.* He is the real person interested in equity, which never suffers itself to be misled by a name or baffled by a definition, but deals with the substance and truth of things, can have no difficulty in recognizing the existing interest and lien of the creditor because it is worked out and made effectual through a legal title in the officer."

Thus the Circuit Court of Appeals in the case at bar, although on an entirely collateral matter, misconceived

the position of this petitioner under the New York law. This Court has uniformly recognized that the State law in such matters is governing; and, in the case of *Rock Island Plow Co.* v. *Reardon*, 222 U. S. 354, the Court, upon the identical point, used the following language (p. 363):

> "That the Circuit Court of Appeals rightly held the affirmative of these three propositions we entertain no doubt. Upon the first two propositions that Court said (p. 658):
>
> 'As the law of Illinois must govern the answers to both cases, and the rule there is well settled, as we believe, for the affirmative answer to each, no difficulty appears in the solution.'"

It follows therefore, that under the New York law, which will be here recognized, this petitioner, as well as the sheriff, had a lien and had possession adversely to the trustees.

It cannot be over-emphasized, however, that the Circuit Court of Appeals did not base its decision upon its view that this petitioner did not have a lien. The Circuit Court of Appeals passed over that question and considered only the fundamental point as to whether the sheriff who, as above shown, was conceded to have possession and a lien, could be ousted in a summary manner. That the Court did pass upon that fundamental point, which said point was before this Court for determination, appears by the language of Judge Hough (Trans., pp. 45-6):

> "Thus the real question was and is whether the sheriff could demand a plenary suit because the creditor who set him in motion alleged solvency in the bankrupt at date of levy.
>
> Argument rests on Section 67-*f*, in that 'all levies, judgments, etc., obtained through legal pro-

> ceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy' shall be avoided 'in case he is adjudged a bankrupt.'"
>
> "We assume that the Referee intended to try the question of solvency or insolvency at date of levy. He followed the practice in this circuit since *Re Kenney* (97 Fed. 554, aff'd. 105 Fed. 897), and again in *Clark* v. *Larremore*, 188 U. S. 486). Nor has the force of these decisions lessened by *Re Andre* (135 Fed. 736), the query in which case was whether before adjudication the lien of an attachment could be avoided. It is true that in neither of these cases did the execution creditor raise the plea of his debtor's solvency; but in the *Kenney* case the sheriff had before petition filed converted the seized goods into money, and that money he owed to the execution creditor. Any more complete title in an adverse claimant, within the ruling in the Babbitt decision, it is impossible to imagine."

The decision of the Circuit Court of Appeals, therefore, in the case at bar, is a clear holding that neither the sheriff nor this petitioner would be entitled to a plenary suit. The foregoing discussion of the New York law would therefore be irrelevant but for the desire of this petitioner that this Court should be correctly appraised of the situation with regard to the New York decisions upon the point discussed by the Circuit Court of Appeals.

POINT V.

The adjudication upon a voluntary petition in bankruptcy does not constitute a determination that the bankrupt was insolvent.

As has already been pointed out from the evidence produced by this petitioner proving the solvency of the *Cowen Hosiery Co., Inc.*, at the date of the levy, not a shred of evidence was presented by the trustees, nor is there any presumption in law from the fact of adjudication in this case that the bankrupt was insolvent at any time. It will be recalled that the adjudication in this case was an adjudication resulting from the filing of a voluntary petition. It is doubtless unnecessary to cite to this Court authorities which hold that voluntary petitions in bankruptcy are meaningless so far as determining solvency is concerned. However, reference may be had for the sake of completeness to a few of the authorities in point. The Bankruptcy Law itself does not require insolvency as a prerequisite to voluntary bankruptcy. The Act reads:

> "SECTION 4-*a*. Any person, except a municipal, railroad, insurance or banking corporation, shall be entitled to the benefits of this Act as a voluntary bankrupt."

The most recent text comment on the question appears in 1 *Collier on Bankruptcy*, 13 Ed. (1923), pages 195-6, where the commentator uses the following language:

> "A voluntary petitioner may even be solvent. There is nothing in the Act which requires the person to be insolvent and there seems to be no reason why, if a solvent person cares to have

> his property distributed among his creditors in bankruptcy, he should not be allowed to do so. It will not be necessary to allege insolvency in the petition, nor prove it, to procure adjudication."

The most recent decision upon this subject is the case of *Ann Arbor Machine Co.*, 278 Fed. 749, 753, which cites numerous authorities upon the subject:

> "That a voluntary adjudication does not conclusively show insolvency on the part of the bankrupt at any time prior to such adjudication is made clear by bearing in mind that a voluntary adjudication in its very nature is not dependent upon, and does not even tend to show, such insolvency, either at the time of such adjudication or at any time prior thereto. *In re Chapel*, 113 Fed. 545; *In re Carlton* (D. C.) 115 Fed. 246; *In re Forster Paint & Varnish Co.* (D. C.) 210 Fed. 652; *In re Hargadine-McKittrick Dry Goods Co.* (D. C.) 239 Fed. 155; *In re Pyatt* (D. C.) 257 Fed. 362; *Collier* (12 Ed.) 141. This contention of the trustee and the conclusion of the learned Referee in this connection must therefore be overruled."

It results that as a matter of law, therefore, no insolvency in this case at any time can be inferred. Had the involuntary petition, filed the day after the levy under this petitioner's execution, been prosecuted and the issue of insolvency raised by this petitioner's answers to the involuntary petition been tried, a speedy and economical disposition of the issue of insolvency would have been possible and the entire matter disposed of. As we have seen, however, the issue thus tendered was declined.

POINT VI.

The procedure adopted by this petitioner below was proper and appropriate.

This Court cannot be oblivious to the rebuke implied in the first sentence of the opinion of the Circuit Court of Appeals. The opinion begins with the statement that "the procedure below was indefensible" (Trans., p. 106). After a discussion of this point, however, this very Court, at folio 107, says:

> "Procedure such as this has never been approved by this Court; *In re Wood* (278 Fed. 355), merely shows that such bad practice is not absolutely forbidden."

Indeed, *In re Wood,* to which reference is made, was decided by this very Court where the very procedure here adopted by this petitioner was followed and the Court in that case passed upon the merits. It is, therefore, clear that this case was not disposed of on the mere question of procedure. This petitioner, however, believes that the procedure followed below was the only procedure consonant with the proper and orderly administration of justice. As we have seen, the creditors twice avoided the issue as to whether summary proceedings would in this case lie, first, in consenting to the vacation of Judge Mayer's order of August 18th while a petition for the revision of that order was pending (Trans., p. 27), and again by withdrawing a motion before the District Court to have the question of solvency specially referred while that motion was pending, after oral argument and awaiting a submission of authorities (Trans., p. 9).

Instead of raising the question in a manner in which it might be completely determined, the trustees obtained this order to show cause from the Referee. The Referee had what authority inhered in him in the present suit only by virtue of the general order of reference which this Court in the case of *Weidhorn* v. *Levy*, 253 U. S. 268, held inadequate authority for such an order to show cause. This petitioner had two courses open—either it could answer to the Referee, object to his jurisdiction and proceed with the taking of tedious testimony involving the examination of numerous witnesses as to the market value of numerous items of merchandise, and then, after all of this obviously useless procedure had been gone through, bring the question of the Referee's jurisdiction before the District Court; or it could go direct to the District Court and have the question of jurisdiction immediately passed upon by the authority which had granted to the Referee those powers which were his. Certainly the cause of economy and speed was the course pursued by this petitioner. In taking this course the petitioner was guided by a decision of the Circuit Court of Appeals in the very circuit where the proceedings were pending (*In re Wood*, 278 Fed. 355). In that case, to use the language of the Court:

> "On January 14, 1920, the Referee in Bankruptcy granted an order *ex parte*, which was served upon the petitioners, directing them to show cause why they should not account for all income, receipts and profits of the property heretofore jointly owned by the bankrupt herein and said petitioners, and 'then and there pay over in cash to the trustees herein all the amounts due or found to be due to said trustees.' Other relief was prayed for. On July 20, 1920, the petitioners, on submission to the District Court, the petitioners obtained a stay of these proceedings under the Referee's order, and directed that cause be

> shown on July 29, 1920, before the Court, why the order should not be wholly vacated and the petition dismissed."

Nevertheless, after intermediate proceedings, the case came before the Circuit Court of Appeals of the Second Circuit and that Court said:

> "These and other questions which are argued at bar specifically show that the petitioners have a defense to the claim for the rents which they collected, and which they are now empowered and directed to pay over to the trustee. It is more than colorable and is substantial. It is a controversy which should be determined in a plenary action and not by summary order. The remedy pursued by the trustee is erroneous."

Thus indicating clearly that in that case also the Circuit Court of Appeals for the Second Circuit considered the procedure by which the Referee's jurisdiction was challenged as quite immaterial. In the light of the decision in the *Wood* case, it is not clear why the same Court in the case at bar should have deemed the procedure "indefensible."

It should again be emphasized that the case was not disposed of on a matter of procedure, however, but on the other hand was disposed of on a fundamental question of jurisdiction, and this point is inserted in this brief for the purpose of explaining to this Court the authority upon which the procedure was adopted and disposing of the collateral matter of procedure referred to in the Court's opinion below.

POINT VII.

The point involved being one of jurisdiction and due process of law, any question of mere convenience should not be given consideration.

The trustees have in both Courts below urged that speedy determination of such questions as are involved in the adverse claim of this petitioner is impossible in State courts and that the economical way to dispose of the matter is to permit the Referee to pass upon the questions in a summary way.

It may not be irrelevant to urge the fact that by avoiding the issue on the involuntary bankruptcy the responsibility for delay rests squarely upon the shoulders of those who are responsible for the bankruptcy proceedings. It is clear, however, that all of these questions relating as they do only to matters of convenience and rapidity of determination are quite beside the point in view of the fundamental nature of the question of jurisdiction involved. It would be intolerable to have one rule as to jurisdiction prevailing in States where the court calendars are more free than the calendars in the Federal Court, and another rule where the reverse is true. It would be intolerable to have the rule vary from time to time as the relative conditions of Federal and State court calendars change. It would be intolerable to have one rule for cities such as New York and Chicago, where the Federal Courts are geographically readily available, and another rule for sparsely populated communities where travel to the seat of the Federal Court and even to the office of the Referee in Bankruptcy is difficult, but access to the State Court at the county seat is ordinarily easy and

convenient. The only way that a universally just and sound rule can be applied is by a clear determination of the forum which, under the Bankruptcy Statute, has jurisdiction, by insisting that that forum should be everywhere and at all times resorted to to the exclusion of every other forum. That is the determination of this Court in its most recent pronouncement upon a kindred subject. In the case of *Galbraith* v. *Vallely*, 256 U. S. 46, Mr. Justice Day used the following language (p. 50):

> "It may be, as suggested by the Circuit Court of Appeals, that a summary proceeding at the instance of the trustee would afford a more speedy and economical determination to the estate in bankruptcy. But the right to recover in such instances, when in suits of the ordinary character, with the rights and remedies incident thereto, has been consistently maintained by this Court. The principle of the *Comingor* case has never been departed from by this Court. It establishes the right of an assignee for the benefit of creditors, to the extent that he asserts such rights to expenses incurred and compensation earned under the assignment in good faith, before the bankruptcy proceedings, to have the merits of his claim determined in a judicial proceeding instituted for that purpose, and in which summary proceedings with punishment for contempt as the means of enforcing the order. We see no occasion to depart from this practice."

Any argument, therefore, based upon considerations of convenience is quite beside the point.

CONCLUSION.

As the result of the consideration of the authorities, it seems unquestionable that every analogous case decided by this Court lends support to this petitioner's

principal contention that it is entitled to a trial of the validity of its lien in a plenary suit. This position is supported by the clear language of the decisions of the Sixth and the Eighth Circuits. Opposed to this clear language is presented the vacillating position of the Second Circuit, which first, *In re Ballou*, adopted the position which the petitioner here maintained, then, *In re Kenney*, assumed the position contended for by the trustees, again reverted to this petitioner's position *In re Andre*, and finally in the case at bar again took the reverse view of the situation.

The principal contention of this petitioner is based upon the fundamental principle of jurisdiction and due process of law and is not to be effected by any mere consideration of convenience.

This petitioner submits then that it has sustained its position; that not alone as a matter of authority, but also as a matter of reason its position upon this fundamental principle is the correct one.

Upon the circumstances of this case, therefore, and also upon the crying necessity for a uniform rule upon this important point applicable throughout the United States and at all times, there should be a reversal of the determination of the Circuit Court of Appeals of the Second Circuit, and the order of the District Court, vacating the order to show cause of the Referee and requiring the determination of the question in a plenary suit, should be affirmed.

Respectfully submitted,

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Supreme Court of the United States.

OCTOBER TERM, 1922—No. 188.

TAUBEL-SCOTT-KITZMILLER CO., INC.,
Petitioner,

—against—

DAVID J. FOX, REGINALD P. BOYD and EUGENE S. BENJAMIN, Trustees in Bankruptcy of GOWNS HOSIERY CO., INC.,
Bankrupt.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF ON BEHALF OF RESPONDENTS.

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Supreme Court of the United States.

OCTOBER TERM, 1923—No. 188.

TAUBEL-SCOTT-KITZMILLER CO., INC.,
Petitioner,

—against—

DAVID J. FOX, REGINALD P. BOYD and EUGENE S. BENJAMIN, Trustees in Bankruptcy of COWEN HOSIERY CO., INC.,
Bankrupt.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF ON BEHALF OF RESPONDENTS.

Statement of the Case.

This record brings up for consideration a decree made by the United States Circuit Court of Appeals for the Second Circuit on December 19, 1922 (Trans. p. 47) reversing an order made by Hon. Julian W. Mack, Circuit Judge, sitting in the United States District

Court for the Southern District of New York, on September 19th, 1922(Trans. pp. 40-42) which vacated an order made by Hon. Seaman Miller, Referee in Bankruptcy, (Trans. p. 10) directing the Appellant to show cause before him why a certain judgment entered in its favor against the Bankrupt on August 15th, 1922 and the levy upon the execution issued thereunder should not be deemed null and void, and why the property affected by said levy and judgment should not be deemed wholly discharged and released therefrom, and why said property should not pass to the Trustees of the above named bankrupt as part of the estate of said Bankrupt (Trans. p. 41). The petitioner had obtained its judgment against the bankrupt on August 15, 1922. On August 24, 1922, the bankrupt filed a voluntary petition in bankruptcy and was on the same date adjudicated a bankrupt. The petitioner advanced the contention that its judgment and the levy under the execution issued thereunder were not affected by the bankruptcy adjudication because, on the date of the recovery of the judgment and the making of the levy, the bankrupt was solvent.

The ground upon which Judge Mack vacated the order or rule to show cause of the Referee was that the latter was without jurisdiction to make the same and that the rights of the Appellant under its judgment and levy could not be determined in a summary proceeding but only by a plenary suit instituted by the Trustees (Trans. p. 41).

The question before this Court is whether the decree of the Circuit Court of Appeals, reversing Judge Mack's order and holding that Referee Miller had jurisdiction to make the order or rule to show cause referred to, was correct.

Facts.

The petitioner's statement of the facts at pages 2 to 7 of its brief is incomplete and, in several respects, erroneous. In addition, it contains numerous statements which are mere arguments and conclusions. This renders it necessary for the Respondents to set forth a complete and accurate statement of all the facts.

The petitioner on August 15th, 1922 entered a judgment in the office of the Clerk of the County of New York against the Bankrupt in the sum of $39,366.55 and on the same day issued execution to the Sheriff of the County of New York, who thereupon levied upon certain property and assets of the Bankrupt at its place of business, No. 114 East 23rd Street, Borough of Manhattan, City of New York. Custodians were placed in charge of the property by the Sheriff, but the property itself was not removed and at all the times involved in the case continued to remain upon the Bankrupt's premises. The filing of this judgment followed an admission by the Bankrupt to its creditors that it was unable to meet its obligations and a request that the said creditors, through a committee, take charge of its affairs and make an investigation (Trans. p. 24). Such a committee was appointed, consisting of most of the largest creditors. This Committee duly convened, organized and retained S. D. Leidesdorf & Co., expert accountants, to audit and examine the books and make a report and also arrange to take an inventory of the merchandise (Trans. p. 24). The judgment of the petitioner was entered while negotiations were being carried on by the Bankrupt and the Creditors' Committee with the said petitioner for an extension of time. In this situation, and with the obvious

purpose of preventing the petitioner from securing a preference Malcolm C. Hutchison, as assignee of the Irving National Bank, a creditor in the sum of $25,000, filed an involuntary petition in bankruptcy on August 16th, 1922, against the bankrupt in the office of the Clerk of the District Court for the Southern District of New York. After the filing of this petition, an application was made to Judge Mayer, then sitting in the District Court, for an order enjoining the petitioner from proceeding to enforce the collection of the judgment entered by it against the Bankrupt and from taking any proceedings under the execution issued to the Sheriff under the said judgment, and enjoining the Sheriff from continuing the levy and directing him to relinquish the said levy upon receiving payment of his fees and charges (Trans. pp. 25-26). Judge Mayer granted the motion and signed an order to that effect (Trans. pp. 25-26). Thereupon, the petitioner filed an answer to the involuntary petition of Hutchison and a petition to the Circuit Court of Appeals to revise Judge Mayer's order. Judge Rogers of the Circuit Court of Appeals granted a stay of Judge Mayer's order pending a hearing of the petition to revise the same. This stay operated to leave the Sheriff in possession.

Counsel for the petitioning creditor in the bankruptcy proceeding, who also represented the Committee of Creditors in control of the Bankrupt's business, being anxious to stop the expenses which were being incurred for sheriff's keepers and to obtain a release of the levy by the Sheriff, thereupon sought the cooperation of the Bankrupt to obtain a speedy adjudication, in the mistaken belief that such adjudication would automatically effect a nullification or discharge of the levy and the release of the property by the Sheriff.

With that object in view, the said Hutchison on August 22nd, 1922, filed an amended involuntary petition in bankruptcy, attaching thereto an admission of the Bankrupt of its inability to pay its debts and of its willingness to be adjudged a bankrupt on that ground. (Trans. pp. 13-14). An answer was promptly filed by the petitioner to this amended petition, thus again preventing an immediate adjudication. To overcome the apparent difficulty, the Bankrupt, on August 24th, 1922 filed a voluntary petition in bankruptcy (Trans. pp. 14-15). This resulted automatically in an adjudication, but did not effect a discharge of the levy. In order to prevent a sale or removal of the property levied upon, an order was obtained by the Bankrupt from Judge Mack on August 25th, 1922 restraining the Sheriff and the petitioner from proceeding under the judgment and the execution issued thereunder (Trans. p. 5). In the meantime, the Sheriff remained on the Bankrupt's premises in possession of the property levied upon. Not content with this protection, the petitioner's attorney had one of his employees appointed a Deputy Sheriff (Trans. p. 37) and had another of his employees make numerous visits to the Bankrupt's place of business (Trans. p. 35). The presence of the Sheriff and deputies necessarily impeded and harassed the Creditors Committee, then in possession and control of the business (Trans. p. 30) and made it impossible for the said Committee to carry on operations. A meeting of the creditors to elect a Trustee not having yet been called, the attorneys for the Creditors Committee applied to Judge Mack for an order restraining the petitioner and the Sheriff from removing, selling or disposing of any of the Bankrupt's property pending the further order of the Court, and referring to a Special Commissioner for

examination, testimony and report the question of whether on August 15th, 1922 (the date of the entry of petitioner's judgment) the Bankrupt was solvent (Trans. pp. 29-31). On the argument of this application, Counsel for the creditors, evidently realizing that the motion to refer the question of the Bankrupt's solvency to a Special Commissioner was premature and that only the Trustees could apply for such a reference, withdrew that portion of their motion (Trans. p. 9). Judge Mack granted the other relief asked for and on September 1st, 1922, signed an order staying the Sheriff and the petitioner from removing or in any way interfering with the property levied upon except to permit them to continue in possession thereof until the further order of the Court (Trans. p. 39).

Thereafter and on September 12th, 1922 the first meeting of creditors was held and David J. Fox, Reginald P. Boyd and Eugene S. Benjamin, the Respondents herein, were appointed Trustees (Trans. p. 1). The Respondents at once applied to the Referee in charge of the case, Hon. Seaman Miller, for an order directing the petitioner to show cause under Section 67 F of the Bankruptcy Act why the judgment and the levy upon the execution issued thereunder should not be deemed null and void, and why the property affected by the said levy and judgment should not be deemed wholly discharged and released from the same and why the said property should not pass to the Trustees as part of the estate of the Bankrupt (Trans. p. 10). The petition upon this application was executed by the respondents as Trustees and recited the various steps in the bankruptcy proceedings as they have been heretofore set forth. It also alleged that the Trustees, to their knowledge, by investigations made by them of the affairs, assets and liabilities of the

Bankrupt, knew that the said Bankrupt was insolvent on August 15th, 1922 (Trans. pp. 10-11). The Referee made an order dated September 15th (Trans. p. 10) requiring the petitioner to show cause before him why its judgment and the levy issued thereunder should not be deemed null and void and the property affected by the said levy discharged and pass to the respondents as part of the estate of the Bankrupt. Before a hearing could be had by the Referee under this order, the petitioner applied to the District Court to vacate the Referee's order upon the ground that he was without jurisdiction to make the same and upon the ground that it was entitled to a plenary suit for the determination of the question of whether its judgment and the execution issued thereunder became null and void under Section 67 F of the Bankruptcy Act (Trans. pp. 4-8). The District Court on September 18th, 1922 granted the motion of the petitioner; directed (1) the order or rule to show cause made by the Referee vacated and the stays previously granted on August 25th and September 1st terminated unless on or before October 9th, 1922 the Trustees institute and commence a plenary suit or action against the petitioner and the Sheriff of the County of New York, in a court having proper jurisdiction thereof, to release the property of the said Bankrupt from the levy of the said Sheriff's execution, (2) that "if and so long as the Trustees so institute such suit or action and diligently prosecute the same, then the stays contained in said orders shall remain in full force and effect until the determination of such suit or action by a court of last resort;" (3) that in the event of a sale of the entire property of the Bankrupt, prior to the termination of the stays, the property subject to the levy shall be included, and "such property shall on

such sale be sold free and clear of all liens and encumbrances, but the proceeds of the sale'' shall to the extent of the lien be paid over to the Sheriff and held by him in place and stead of the property (Trans. pp. 40-42). The respondents filed a petition to revise this order of the District Court (Trans. pp. 1-2) and in due course the matter came on to be heard before the Circuit Court of Appeals for the Second Circuit. That Court unanimously reversed the order of the District Court (Trans. pp. 43-47), and held that the Referee had jurisdiction to make the order to show cause which had been vacated by the District Court, and remanding the matter to the District Court for further proceedings consistent with its opinion. It is from this decree of reversal of the Circuit Court of Appeals that the writ of certiorari was granted by this Court.

This case has been before this Court twice since the granting of the writ of certiorari, the first time on an application made by the respondents to vacate the writ of certiorari or in the alternative to advance the date for argument upon the said writ. This application was based upon the fact that, subsequent to the decision of the Circuit Court of Appeals, holding that the Referee had jurisdiction to entertain the proceedings initiated by the respondents as Trustees to declare the petitioner's judgment null and void under Section 67F of the Bankruptcy Act, and prior to the granting of the writ of certiorari by this Court, the trial of such proceedings had taken place before the Referee, who, after hearing the proofs and evidence offered by the respondents and the petitioner, had found as follows:

"Taking all of the facts and circumstances in this case, I have no doubt in my mind that these assets at a fair market value on August 15th, 1922 were much less than the liabilities of the company (the bankrupt) and I find as a matter of fact, from the testimony herein, that at that time the Cowen Hosiery Co., Inc. was insolvent." (Answer of respondents to application of petitioner for writ of prohibition, p. 5).

The respondents contended that a decision holding insolvency to have existed on August 15, 1922 having already been rendered, the question raised by the writ of certiorari was academic. The respondents, however, asked this Court, in the event that this motion was denied, to advance the cause for argument, upon the ground that the Sheriff continued to remain in possession, interfering with the management and operation of the bankrupt's business and preventing a sale of the assets and the administration of the estate by the respondents as Trustees, and that the charges and expenses of the Sheriff were increasing daily, thus rendering it absolutely necessary that a speedy decision be had upon whether the petitioner was to have the issue of solvency retried in a plenary suit. The petitioner opposed both branches of the respondents' motion, even objecting to that portion thereof which asked to have the cause advanced for argument. This Court denied the entire motion. (Answer of respondents to application of petitioner for writ of prohibition pp. 6 and 7).

The second time, the case came before this Court upon an application by the petitioner for a writ of prohibition against Hon. Augustus N. Hand, District Judge, to restrain him from making an order author-

izing a sale of all of the assets of the bankrupt estate, including the assets seized by the Sheriff, to one Woldenberg upon an agreed payment to creditors of 57½% of their claims, the right of the petitioner to receive 100% of its claim, in the event its judgment and levy were upheld, being provided for. After this Court had denied the motion to vacate the writ of certiorari and to advance the cause for argument, the respondents as Trustees found it necessary to have some speedy disposition made of the assets of the bankrupt estate, which were being gradually dissipated by the increasing charges of the Sheriff and the interference to the business caused by the presence of the Sheriff and his deputies. As argument on the writ of certiorari could not be reached for many months, and as the trial of a plenary suit, if one was directed by this Court, would consume many months more, it was manifest that the estate would be literally ruined unless something was done to insure a speedy disposition of the assets and a stoppage of further expense. All the creditors having agreed to accept 57½% of their claims and having agreed to a sale of the assets to one Woldenberg, who undertook to pay such 57½% and all the administration expenses and also the entire amount of the petitioner's claim in the event its judgment and levy should be upheld, Judge Hand, after a hearing, directed the respondents to accept the said offer of Woldenberg and directed the release of the property seized by the Sheriff upon condition that the respondents deposit with the Sheriff the full amount of the petitioner's claim, to be held by the Sheriff pending a final decision. The petitioner thereupon filed an application in this Court for a writ of prohibition against Judge Hand on the theory that the contemplated order deprived it of its rights

to continue the Sheriff in possession pending a final decision. Respondents filed their answer to this application for a writ of prohibition and the same was denied. Thereupon the order of Judge Hand was made effective and the assets of the bankrupt estate transferred to Woldenberg, who paid the creditors 57½% and turned over to respondents the full amount of the petitioner's claim, which, in turn, the respondents deposited with the Sheriff to be held pending a final decision.

Answer to Petitioner's Claim that it was a Stranger to the Bankruptcy Proceedings.

Before proceeding with our argument, we must refer to the wholly incorrect statement appearing at page 6 of petitioner's brief, viz: that it at no time appeared in the bankruptcy proceedings and was a stranger thereto. From this statement it is argued that the petitioner could not be subjected to the jurisdiction of the Bankruptcy Court. In fact, the petitioner appeared in the Bankruptcy Court and applied for an order to conduct an examination of the Bankrupt under Section 21-A (Trans. p. 5). Having obtained such an order, the petitioner conducted a protracted examination. During the course of this examination the petitioner made a motion to adjudge certain of the officers of the bankrupt in contempt for an alleged failure to obey a subpoena served upon them. This motion was denied. The petitioner also appeared in the Bankruptcy Court for the purpose of making a motion to vacate the adjudication entered upon the voluntary petition, upon the ground that the Bankrupt was not entitled to have

itself adjudicated. This motion was also denied. While the record now before the Court does not include the papers used on these motions, they are part of the file of the District Court.

Answer to Petitioner's Claim of Proof of Solvency.

Another incorrect statement appears at pages 8 to 10 of the petitioner's brief to the effect that on the motion to vacate the Referee's rule to show cause, it proved the solvency of the bankrupt on August 15th, 1922. This statement is made the basis of an argument by the petitioner that such proof of solvency established the existence of a substantial adverse claim and that therefore the petitioner was entitled to a plenary suit.

In the view which we take, the decision in this case does not depend upon what showing of solvency or insolvency was made before the District Court upon the motion to vacate the Referee's rule to show cause, but depends entirely upon the proper construction of Section 67F of the Bankruptcy Act. Nevertheless, the facts and figures mentioned by the petitioner, in its attempt to demonstrate solvency, are so misleading and inaccurate that, for a proper understanding of the exact situation, some reply must be made thereto.

The petitioner claims to have demonstrated solvency in three different ways (1) by alleged statements made by the bankrupt's attorneys at a meeting of creditors a week prior to the entry of the petitioner's judgment; (2) by the bankrupt's own schedules filed in the voluntary proceeding; and (3) by certain

admissions developed in the course of an examination under Section 21A of the officers of the bankrupt company. We will discuss these in their order.

(1) *As to statements made at meeting of creditors held on August 8th, 1922.* The petitioner alleges that it was informed by its attorney that one Henry Fluegelman, acting as attorney for the bankrupt, together with one Henry F. Blum made a statement at a meeting of creditors called on August 8th, 1922 (before any bankruptcy proceedings had been commenced) that the bankrupt was solvent and that its assets exceeded its liabilities by approximately $60,000 (Trans. p. 7) One Geller, an attorney employed by the petitioner's counsel, in an affidavit filed by him states that at the meeting in question Mr. Blum made a statement that the bankrupt was solvent and that its assets exceeded its liabilities by a sum in excess of $56,000. The petitioner at no place in any papers filed by it mentions whether these figures were stated to have been based upon book valuations of assets or the real market value of the assets; nor are any specific items of assets and their values enumerated; nor is any claim made that these attorneys were competent to appraise the articles of merchandise and other property comprised in the bankrupt's assets. A merchant might very readily be solvent upon the basis of the book valuations of his assets and yet be hopelessly insolvent if such assets are valued at their fair market price. It must be obvious that such vague and indefinite statements are utterly worthless as evidence of solvency. Moreover, assuming these statements to possess any value, how could they be binding upon the respondents in a proceeding commenced months later.

(2) *As to the schedules filed by the bankrupt in the voluntary proceedings.* The petitioner claims that these schedules show a surplus of $50,607.97. This is manifestly incorrect. Schedule A of the bankrupt's petition (Trans. pp. 16-17) shows total liabilities secured and unsecured of $284,669.41. Deducting, however, from the amount of the secured claims, the value of the securities or collateral held by these secured creditors reduces the liabilities to $226,331.63. The asests as shown by schedule B (Trans. pp. 19-23) amount to $238,989.48, to which should be added $37,950.05, being the surplus of security held by the Manufacturers' Finance Co. of Baltimore over the amount of its claim against the bankrupt. This makes a total of $276,-939.53. Thus, there results an apparent surplus of $50,607.90. In the assets, however, is included a claim against A. W. Cowen & Bros. in bankruptcy amounting to $80,864.90 (Trans. p. 20). It would be obviously improper to value this claim at the full face amount because, as the records of the District Court show, the firm of A. W. Cowen & Bros. effected a settlement in bankruptcy of 27½%, so that the value of this claim instead of being $80,864.90 is $22,237.84, or a difference between the real value and the face value of $58,627.06. Therefore, even assuming that all the other assets were carried at their full realization value, the bankrupt corporation, according to its own schedules, was insolvent. It should be mentioned that the petitioner's motion to vacate the adjudication entered upon the bankrupt's voluntary petition, heretofore referred to, was predicated upon the proposition that the bankrupt was solvent. This motion, as already stated, was denied by the District Court and no appeal ever taken therefrom by the petitioner.

(3) *As to admissions made by officers of the bankrupt corporation that further assets existed not disclosed by the schedules.* The proof which the petitioner claims to have furnished the District Court concerning these admissions is a statement in the petition of the Secretary of the petitioner (Trans. pp. 7 and 8) to the effect that one Elias D. Cowen, the Treasurer of the bankrupt, in his examination under Section 21A, testified that in scheduling the merchandise on hand at $125,000 he had been in error and that this figure should have been in the neighborhood of $200,000; also, that he had been informed by his attorney, Herman Goldman, that this examination revealed liabilities on the part of the officers of the bankrupt to the bankrupt in very large sums. The testimony of the said Elias D. Cowen was not set forth, nor did the Secretary verifying the petition indicate that he had any personal knowledge of the testimony given by the said Cowen. No details or particulars of the alleged claims against the officers of the bankrupt corporation or as to whether such claims could be collected are set forth. No details of any character are given from which the Court could even infer the existence of an asset in these alleged claims. It would be idle to regard these statements made by the Secretary of the petitioner as evidence of any character or value whatever.

That such statements can be regarded as proof of the bankrupt's solvency cannot, we believe, be seriously maintained. Moreover, the respondents in their petition to the referee alleged that, to their own knowledge, by investigations made by them of the affairs, assets and liabilities of the bankrupt, it was insolvent on Aug. 15, 1922. Surely this statement was entitled to at least the same weight as the averments in the petitioner's affidavits.

ARGUMENT.

POINT I.

(a) Under Section 67F of the Bankruptcy Act the District Court has summary jurisdiction to declare a judgment entered within four months of the date of adjudication null and void and the property affected by the said levy and judgment discharged and released and to order the conveyance of the said property to the trustee.

(b) The doctrine, that a person asserting more than a merely colorable claim of adverse title to property transferred prior to the bankruptcy cannot have his rights summarily disposed of by the Bankruptcy Court, but is entitled to a plenary suit, does not apply.

The petitioner has become confused as to the precise point of law presented by this appeal. It assumes that a proceeding under Section 67F of the Bankruptcy Act to decree a judgment and levy obtained through legal proceedings within four months prior to the filing of a petition in bankruptcy null and void and to obtain a discharge of the property affected by said judgment and levy falls in the same legal category as a suit by the Trustee to set aside a transfer of property made by the bankrupt before the bankruptcy to a person who holds said property under an

adverse claim of title. Arguing from this premise, the petitioner refers to the decisions of this Court holding that in the last named class of cases the Bankruptcy Court has no power to summarily dispose of the adverse claims of title and that such adverse claimants are entitled to a plenary suit. Nothing, however, could be more erroneous than to assume that a proceeding under Section 67F is the same or even similar to a suit against an adverse claimant in possession upon a transfer antedating the bankruptcy. When once the fundamental distinction between the two classes of cases is grasped, the fallacy of the petitioner's contentions become manifest.

Since the proceedings in the District Court were based upon Section 67F of the Bankruptcy Act, it seems to us not amiss to refer to the language of that Section. It reads as follows:

> "That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the Trustee as a part of the estate of the bankrupt, unless the Court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the Trustee for the benefit of the estate as aforesaid. And the Court may order such conveyance as shall

be necessary to carry the purposes of this section into effect: Provided, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

That the situation presented to the District Court by the petitioner's judgment against the bankrupt and the levy of the execution made thereunder comes squarely within the purview of the sub-division of Section 67 above quoted is not open to doubt. The petitioner had obtained this judgment and issued execution thereunder against the bankrupt's property on August 15th, 1922. The voluntary petition in bankruptcy was filed on August 24th, 1922, and on the same date the bankrupt was adjudicated. Whether the judgment and the levy made by the petitioner became null and void depended only upon whether the bankrupt was insolvent on the date thereof. The respondents as Trustees of the bankrupt estate claimed that the judgment and levy had become null and void because the bankrupt was insolvent on August 15th. The petitioner denied the existence of such insolvency on that date. There was thus presented the simple issue of solvency on Aug. 15, 1922. What Court was to decide this issue? According to the petitioner's contentions, the Bankruptcy Court was wholly powerless to deal with the controversy and only the State Courts, whose process could have been invoked by the bankrupt had there been no adjudication, possessed jurisdiction to determine the issue of solvency. That this contention is unsound and contrary to the letter and spirit of the statute must be

clear from the most casual consideration of the scope and purpose of Section 67F and of the express powers vested by that Section in the Bankruptcy Court for the enforcement thereof. After providing that all levies, judgments, attachments and other liens obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a petition against him shall be deemed null and void in case he is adjudged a bankrupt and that the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released and shall pass to the Trustee as part of the estate unless the Court shall order that the right under such levy, judgment, attachment or other lien shall be preserved for the benefit of the estate, the Section contains the following very significant language:

> "And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect."

This proviso can mean but one thing and that is that it was intended to confer upon the Bankruptcy Court full power to deal with levies, judgments, attachments or other liens obtained through legal proceedings within four months of the bankruptcy and to decree them null and void and the property affected thereby discharged and released and to order a conveyance of the property to the Trustee. If we are correct in this contention, it necessarily follows that the Bankruptcy Court has power to conduct such inquiries or to entertain such proceedings as may be required to determine whether a levy, judgment, attachment or other lien obtained through legal proceedings within four months

shall be deemed null and void and whether the property affected thereby shall be deemed wholly discharged and released. If it was not intended by Congress to vest in the Bankruptcy Court the power to conduct such inquiries, there would be no occasion for the proviso above quoted. That proviso could only be made operative if the Bankruptcy Court possessed the power to hear and determine proceedings under Section 67F. If, as maintained by the petitioner, the Bankruptcy Court was wholly without jurisdiction and only a State Court in a plenary suit could determine whether the judgment and the levy had become null and void, what meaning shall be attributed to the clear language of the proviso? If only the State Court possessed power to determine whether a judgment and levy should be deemed null and void, that Court would be the one required to order the necessary conveyance to the Trustee to effectuate the purposes of Section 67F. The petitioner at pages 32 to 34 of its brief attempts to answer this argument by the statement that the proviso under discussion only applies to the situation where the Court orders that the right under a levy, judgment, attachment or other lien shall be preserved for the benefit of the bankrupt estate and that the same may pass to and shall be preserved by the Trustee for the benefit of the bankrupt estate. This theory, however, is patently erroneous. In the first place, the proviso reads that the Court may order such conveyance as shall be necessary to carry *the purposes of this section* into effect. The power is granted to order conveyance to carry the purposes of the entire section into effect, not merely that portion of the section dealing with the power of the Bankruptcy Court to preserve the right under a levy, judgment, attachment or lien. In the

second place, it is not clear that the power to order a conveyance is necessary to effectuate the preservation of a right under a levy, judgment, attachment or other lien. The petitioner, in its argument (page 33) admits that the power to preserve a right under a levy, judgment, attachment or lien is vested in the Bankruptcy Court so that "if the best interest of the estate required it, instead of having the property passed on to the Trustee, the Court may order that the lien shall be availed of by the Trustee so that any advantage which may inhere in the lien may be availed of by the estate." If this be the correct scope and purpose of the language of Section 67F under consideration, then manifestly the power to order a conveyance is unnecessary, since all that is required in order to enable the Trustee to avail himself of the lien is not to have the property conveyed, but to order the right under the levy, judgment, attachment or other lien preserved.

From whichever angle the language of the proviso is viewed, it becomes clear, not only from its express terms, but also from a consideration of the plain design and intent of Section 67F, that it vests power in the Bankruptcy Court to declare null and void a levy, judgment, attachment or other lien and to order a conveyance of the property affected thereby to the Trustee.

Significant, too, as to the power of the Bankruptcy Court to entertain proceedings under Section 67F and the fact that it was not intended to afford persons obtaining levies, judgments, attachments or other liens within four months of the bankruptcy petition the right to a plenary suit in a State Court, is the omission of any provision conferring jurisdiction upon a State Court to determine whether such levies, judg-

ments, attachments or other liens shall be deemed null and void. If a right to a trial in another forum than the Bankruptcy Court was to be granted in cases falling under Section 67F, it is not to be assumed that Congress would have remained silent upon so important a point. Where it was intended to give adverse claimants a right to a plenary suit, such intention has been plainly manifested by Congress. Thus, a proviso was made at the very end of sub-divisions a, b, c, d and e of Section 67 that

> "For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State Court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

If it had been the intention of Congress to require a plenary suit in order to enforce the provisions of sub-division F of Section 67 of the Act, the proviso above quoted would have appeared after sub-division F instead of after sub-division E. The very fact that the forum for the enforcement of sub-divisions a, b, c, d and e is specifically designated, whereas in connection with sub-division F, it is provided that the Bankruptcy Court may order such conveyance as shall be necessary to carry the purposes of that section into effect, plainly discloses the intention to differentiate between the various character of proceedings embraced by Section 67 and to confine the power of enforcement of Section 67F to the Bankruptcy Court, where naturally and properly it belongs and where machinery exists for its speedy administration.

In the one case which has come before this Court since the enactment of the Bankruptcy Act of 1898

involving the precise question presented by this appeal, the power of the Bankruptcy Court to make a summary order for the enforcement of Section 67F of the Act was sustained. That was the case of *Clarke* v. *Larremore,* 188 U. S. 485, affirming *In re Kenny,* 105 Fed. 897, a decision by the United States Circuit Court of Appeals for the Second Circuit, which in turn, affirmed *In re Kenny,* 97 Fed. 544, in the United States District Court for the Southern District of New York. The case referred to was precisely parallel to the instant case. On March 6th, 1899, one Clarke recovered judgment against Kenny in the sum of $20,906.66, and execution was issued on the same day. On March 15th, 1899 the Sheriff sold out defendant's stock of goods, which he had levied upon, for $12,451.09. On April 13th, 1899 an involuntary petition in bankruptcy was filed and Kenny was adjudged a bankrupt on July 12th. The Sheriff not having paid over the proceeds of the execution at the time the petition was filed, was temporarily enjoined from doing so. On November 25th, 1899 a Trustee in Bankruptcy having been appointed, the District Judge, after a hearing on which Clarke, the judgment creditor, appeared, presented testimony and was heard, made a further order directing the Sheriff to pay the money over to such Trustee. This order was appealed to the Circuit Court of Appeals and affirmed. Judge Lacombe, writing for the Court, said:

> "There can be no doubt that it was the intention of Congress by this section to prohibit creditors of a bankrupt from obtaining preferences over other creditors, as the result of any legal proceedings against him, during the period of four months prior to the filing of the petition;

and apt words are used to express that intention. The property of the bankrupt is safeguarded against all such proceedings by the provision that such of them as would ordinarily be liens against such bankrupt shall be deemed null and void, and the property wholly discharged and released from the same. A broad and liberal construction of the section should be adopted if necessary to effect this intent, but no strained construction is necessary in the face of language so comprehensive * * *.

As a consequence, the goods have been forcibly removed, without right, from the bankrupt's possession by Clarke and the sheriff, and are still to be considered a part of his estate, for the return of which the court (by explicit provision in the section) may provide summarily by order, except that the title of a bona fide purchaser for value shall not be interfered with. It makes no difference whether the creditor and sheriff, whose only title rests on 'null and void' proceedings, hold the goods themselves, or the money which represents them, nor whether, as soon as the Sheriff sells under execution, it is his duty to turn over the proceeds to the judgment creditor, nor whether under the law of New York the sheriff holds the proceeds as the agent of the creditor, nor that ordinarily such proceeds would be the property of the judgment-creditor * * *."

This Court having issued a writ of certiorari to the Circuit Court of Appeals upon the petition of Clarke, the judgment-creditor, the entire proceeding was here reviewed, resulting in an affirmance of the decree. Mr. Justice Brewer, who wrote the opinion

of this Court, held that the rights of the judgment-creditor under his execution were subject to interception by the bankruptcy adjudication just as such rights were subject to a reversal of the judgment by an Appellate Court and that such bankruptcy proceedings took away the foundation upon which the rights of the creditor obtained by judgment, execution, levy and sale rested and that the duty of the Sheriff to pay the money over to the judgment-creditor was gone and that the money became the property of the bankrupt estate and was subject to the control of the Trustee. The rule was thus stated by Mr. Justice Brewer:

> "The bankruptcy proceedings operated in the same way. They took away the foundation upon which the rights of the creditor, obtained by judgment, execution, levy and sale, rested. The duty of the Sheriff to pay the money over to the judgment-creditor was gone, and that money became the property of the bankrupt, and was subject to the control of his representative in bankruptcy * * *. It is enough now to hold that the bankruptcy proceedings seized upon the writ of execution while it was still unexecuted and released the property which was held under it from the claim of the execution creditor."

The contention was advanced in that case just as it was in the case at bar that the Sheriff's seizure and possession of the merchandise vested in him some species of property which the Bankruptcy Court was without power to take away. Disposing of that contention, Mr. Justice Brewer said:

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"The contention of the petitioner is that 'The Sheriff having sold the goods levied on before the filing of the petition in bankruptcy, the proceeds of the sale were the property of the plaintiff in execution, and not of the bankrupt, at the time of the adjudication, and the trustee, therefore, has no title to the same'. This contention cannot be sustained."

It is to be observed that the case under discussion was a stronger case than the instant case. There, the Sheriff had already sold the property seized under the levy, whereas in the case at bar, no such sale had been had and the Sheriff was simply holding possession subject to an injunction order made by the District Court restraining a sale.

Neither the decision in Clarke v. Larremore, nor the doctrine thereof have ever been overruled or questioned by any subsequent decision of this Court and that case contains the latest expression of this Court upon the point under discussion.

The petitioner, at pages 38 to 41 of its brief, discussing the authority of this case, seeks to show that such authority is lessened, if not entirely destroyed by the fact that the precise question of a right to a plenary suit was not raised nor passed upon and that in a subsequent decision the Circuit Court of Appeals for the Second Circuit, in the case of *In re Andre,* 135 Fed. 736 had corrected the supposedly erroneous doctrine of Clarke v. Larremore. This last observation is wholly incorrect. In re Andre in no sense vitiated the earlier decision of In re Kenny. What was sought in the Andre case was to nullify the lien of an attachment *before adjudication.* That, of course, was impossible and the Circuit Court of

Appeals reversed the order of the Court requiring the delivery of the property affected by the said attachment to the Receiver in Bankruptcy. The theory of the creditors, who initiated the proceeding in the Andre case to have the attached property released by the Sheriff and turned over to the Receiver was that, under the Bankruptcy Act, it was the Receiver's duty to take all the property of the bankrupt by virtue of Section 2, Clause 3 and Section 69 of the Act. The question of the power of the Bankruptcy Court to enforce the provisions of Section 67F of the act was neither argued nor decided. Judge Wallace correctly stated the proposition before the Court as being

> "Whether the Court should have made the order by which *before there had been any adjudication in bankruptcy* the Sheriff was required to assume the responsibility of releasing his levy upon the property."

The concurring opinion of Judge Lacombe, referred to at page 39 of the petitioner's brief, must be read in the light of the facts of the case then under consideration. He was entirely correct in holding that the decision in the Kenny case could furnish no authority for the order sought in the Andre case. Such opinion, however, cannot be regarded as any modification of the doctrine of the earlier case, which presented a wholly different state of facts and was brought under an entirely different Section of the Bankruptcy Act. Nor do we understand how Judge Lacombe could have overruled the doctrine of the earlier case after that doctrine had been affirmed by this Court. As to the other point of the petitioner,

that the question of jurisdiction was not argued in the Kenny case, it is unnecessary to do more than refer to the sweeping character of Mr. Justice Brewer's opinion and particularly to the portions thereof which we have quoted. Such language is not reconcilable with the existence of any doubt as to the jurisdiction of the Bankruptcy Court in the enforcement of Section 67F of the Act.

Other Authorities Supporting the Respondents' Position Considered.

Black on Bankruptcy (3rd Edition, Section 387), discussing the power of the Bankruptcy Court to make a summary order to determine the validity of liens asserted upon a Bankrupt's property, states the following:

> "The Court of bankruptcy has jurisdiction to inquire into and determine the validity, extent and priority of liens asserted upon any property of the bankrupt which has come into its actual or constructive possession, *in a summary manner, or at any rate without the formalities attending a plenary suit, on the petition of the trustee desiring to contest the alleged lien or to settle any question in regard to it.* (Citing cases.)"

To the same effect see:

> *In re Ransford,* 194 Fed. 658 (C. C. A. 6th Circuit).

In that case the judgment-creditor commenced an action against the debtor, which afterwards became

bankrupt, and at the same time caused a garnishment to be issued. Later judgment was rendered in favor of the Judgment-Creditor, and also against the garnishee, and an execution was issued against the garnishee. However, no action was taken thereon, and within four months the debtor was adjudicated bankrupt by an involuntary petition, and a summary proceeding was brought to determine that the garnishment fund pass to the bankrupt's estate, and that the trustee be authorized to collect the same. The Judgement-Creditor raised the objection that he was an adverse claimant, and that the District Court had no jurisdiction to entertain summary proceedings. The Court sustained, however, the summary order of the District Court directing the garnishee to pay the money in question over to the Trustee, free from any lien of the judgment and execution.

To the same effect is:

> *Staunton* v. *Wooden*, 179 Fed. 61 (C. C. A. 9th Circuit).

In that case the Court said:

> "Where the claim of possession, as against the Trustee's right of possession, is based solely on an attachment lien, which is annulled by the adjudication in bankruptcy, the person or officer so in possession holds as bailee for the trustee, and must deliver the property upon proper demand, and may be required to do so by a summary order issued from the bankruptcy court. He is not an adverse claimant, and his mere refusal to surrender the property does not make him such."

A recent case reviewing all of the authorities and upholding the power of the Bankruptcy Court to enforce the provisions of Section 67F by summary order is the case of *In re Community Stores of Iowa, Inc.*, 282 Fed., 328. That case came before the United States District Court for the Northern District of Iowa, Central Division, upon a petition filed by the Sheriff of Carroll County to review the order of the Referee in Bankruptcy by the terms of which the referee on summary proceeding ordered said sheriff to turn over to the trustee of said Community Stores of Iowa the sum of $1,742.85 held by the sheriff as receipts from the sale of property sold on execution under a judgment rendered in the District Court of Iowa, in and for Carroll County, in an action by Kerwin & Schiltz against the bankrupt. The action was commenced on the 18th day of December, 1920, and a writ of attachment issued in aid thereof and levy made on the same date upon a stock of merchandise. The defendant defaulted on January 13th, 1921 and on January 19th formal judgment was entered against the defendant which directed the sale of the attached property. On January 18th, the day before final judgment was entered, an involuntary petition in bankruptcy was filed against the Community Stores of Iowa, and on February 7th adjudication in bankruptcy was entered. A rule to show cause was thereupon issued and served upon the sheriff requiring him to appear and show cause why he should not turn over to the trustee the proceeds of the sale then in his hands. The sheriff appeared and filed a plea alleging the solvency of the bankrupt at the time of the levy of the writ of attachment, and claiming the right to a trial by plenary suit. A hearing was had upon the issues thus joined. No evidence was

offered to show the solvency of the bankrupt at the time of the levy of the writ of attachment, and the Referee made the order which was the subject of the petition to review. Judge Scott, affirming the Referee's order and upholding the summary power of the Referee to deal with the Trustee's application against the sheriff, said:

> "Now on this 31st day of July, 1922 said matter having been taken under advisement, comes on for final determination. It appears without controversy that the action in the state court, the issue and levy of the writ of attachment, the judgment, issue of execution and sale of property all took place within four months preceding the filing of the involuntary petition and the adjudication in bankruptcy. In such circumstances under the provision of the Bankruptcy Law, Section 67F (U. S. Comp. St., Section 9651), the proceedings in the state court so far as they affected any lien upon the property or proceeds, became null and void, assuming the insolvency of the bankrupt at the date of the levy of the writ of attachment.
>
> "The question as to whether the controversy thus presented may be determined upon summary proceedings before the referee, or whether on the contrary a plenary action must be instituted in a court of competent jurisdiction, is presented. In the opinion of the court said controversy may be determined in a summary proceeding before the referee. *Clarke* v. *Larremore*, 188 U. S. 486; *Staunton* v. *Wooden*, 179 Fed., 61; and cases cited; *Yumet & Co.* v. *Delgado*, 243 Fed. 519; *In re Rathman*, 183 Fed., 913; *In re Schow*, 213 Fed., 514; *In re Logan*, 196 Fed., 678; *Knapp & Spencer Co.* v. *Drew*, 160 Fed., 413."

The referee found as a conclusion of law that the controversy presented might be determined upon summary proceedings before the referee. In the opinion of the court said order should be and the same is hereby affirmed."

See also:

Orr v. *Tribble*, 158 Fed., 897;
In re: *Knight*, 125 Fed., 35;
In re: *Southern Arizona Smelting Co.*, 231 Fed., 87.

In the latter case the practice invoked was the same as in the instant case.

In *Hardt* v. *Schuylkill Plush & Silk Co.*, 69 App. Div., 90 (N. Y.) a motion was made by the Trustee in bankruptcy to vacate an attachment which was levied within four months prior to the date of adjudication of bankruptcy. The motion was made upon the Trustee's petition or affidavit, stating under oath that the defendant (bankrupt) was insolvent at the date of the issuance of the attachment and the levy thereon. The Appellate Division held that this was the proper practice. Ingraham, J., said:

> "Although by the express provisions of the statute the attachment is to be deemed null and void, and the property affected by the attachment wholly discharged and released from the same, we agree with the court below that it was the proper practice to apply to the court for an order formally discharging the attachment and releasing the goods of the bankrupt from the levy."

It is also a familiar principle of law that when the res or property affected is in the bankruptcy court by virtue of the title being in the trustee in bankruptcy, all questions respecting the title, possession or control of the property may be heard summarily by the Bankruptcy Court. This principle is well enunciated in *Murphy* v. *John Hofman Co.*, 211 U. S. 562, where the Court said:

> "But where the property in dispute is in the actual possession of the court of bankruptcy, there comes into play another principle, not peculiar to courts of bankruptcy, but applicable to all courts, Federal or State. Where a court of competent jurisdiction has taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The court, having possession of the property, has an ancillary jurisdiction to hear and determine all questions respecting the title, possession or control of the property. In the courts of the United States this ancillary jurisdiction may be exercised, though it is not authorized by any statute. The jurisdiction in such cases arises out of the possession of the property, and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them. *Wabash R. Co.* v. *Adelbert College*, 208 U. S. 39 * * *. The last two cases cited proceed upon and establish the principle that when the court of bankruptcy, through the act of its officers, such as referees, receivers or trustees, has taken possession of a res, as the property of a bankrupt, it has ancillary jurisdiction to hear

and determine the adverse claims of strangers to it, and that its possession cannot be disturbed by the process of another court."

The applicability of the principle discussed in the case last cited is pointed out by Judge Hough in the opinion of the Circuit Court of Appeals in the instant case. Judge Hough calls attention to the fact that even after the levy of the petitioner, the Bankrupt remained the general owner of the property seized, subject only to the lien of the levy and the claim of the Sheriff for his fees. Thus, title to the goods which had been in the bankrupt vested in the respondents and such title and the fact that possession of the property was in the respondents subject only to the liens mentioned, conferred a right on the Bankruptcy Court to inquire whether the lien of the petitioner was or was not dischargeable. Judge Hough cites *Scott* v. *Morgan*, 94 N. Y., 508 and *Hotchkiss* v. *McVicker*, 12 John, 403 as authority for the statement that title to the property remained in the Bankrupt even after the levy. Mr. Justice Brewer, in his decision in *Clarke* v. *Larremore, supra*, enunciates the same rule and also refers to the case of *Scott* v. *Morgan* as authority. The petitioner under Point IV of its brief, endeavoring to escape from the effect of this decision and to demonstrate that the Respondents, as Trustees, had neither title nor control of the property seized under the levy, cites the case of *National Park Bank* v. *Goddard*, 131 N. Y. 494 and remarks that that decision has overruled *Scott* v. *Morgan, supra*, so far as the same has any application to the present case. The most cursory examination of the decision in *National Park Bank* v. *Goddard*, supra, indicates the inaccuracy of the petitioner's observation. That case not only does

not overrule *Scott* v. *Morgan, supra,* but expressly affirms it. Speaking of the doctrine that after levy under execution the Bankrupt remains the general owner of the property seized and is entitled by virtue of said ownership to the benefit of its full value, Mr. Justice Finch, said:

> "We are referred to the language of the late Chief Judge in Scott v. Morgan, which described the position of the plaintiff in an execution. As a statement of the legal right of the execution creditor, no fault is to be found with it."

The language which follows this excerpt, and which the petitioner would have this Court accept as a repudiation of the authority of *Scott* v. *morgan,* deals with a peculiar situation. The facts were that a certain firm had obtained a great amount of property through false representations. The plaintiff relying upon these representations had loaned the firm the sum of $90,000. Discovering the fraud he attached the whole stock of goods of the firm, consisting principally of ready-made clothing. Many creditors, who had been induced by the same false representations had sold to the said firm the materials out of which the said clothing was manufactured, and having learned of the fraudulent scheme, elected to rescind their contracts of sale for fraud, and each brought an action of replevin against the sheriff and the fraudulent vendees to recover the specific property sold. Plaintiff thereupon brought an action in equity asking for an adjudication of his claim, for the appointment of a receiver of the property and for an injunction. The Court of Appeals held that a court of equity had jurisdiction to intervene to prevent a multiplicity of suits involving conflicting claims

to the same property, which a court of law could not, but which equity could solve without working injustice, and that although the plaintiff as attaching creditor had no legal title to the property attached, yet was the real party interested and so was entitled to bring the action.

It is evident that this case adjudicates no principle militating against the doctrine of *Scott* v. *Morgan*, *supra*. The statement in the opinion that the officer who makes the levy holds the title for the protection of his levy and for the benefit of the levying creditor and thereby obtains an interest in and to the property is wholly consistent with the theory and the conclusion of the earlier case. There is no overruling of the underlying principle that legal title in the merchandise levied upon remains in the judgment debtor subject only to the lien of the judgment creditor and sheriff. As Judge Hough so clearly points out (Trans. pp. 46-47), the learned District Court, notwithstanding its disclaimer of any jurisdiction in the premises recognized the right and the power to retain absolute control over the goods and over the Sheriff and by its orders (Trans. pp. 37, 39-40 and 40-42), first restrained the Sheriff from disposing of the goods or selling them and then later required the Sheriff to sell if and when ordered so to do by the Bankruptcy Court, free from his lien, and to hold the proceeds until a Court of competent jurisdiction had established the applicability or inapplicability of Section 67 F. If the District Court had no jurisdiction in the premises, it had no jurisdiction to make these orders against the Sheriff or retain control over the goods. If it did have such power, it necessarily had the right to examine into and determine the matter of any liens upon the said property.

POINT II.

(a) The so-called analogous authorities relied upon by the petitioner have no application to the case at bar.

(b) Only persons making claims of adverse title to property based upon transfers antedating the bankruptcy or holding liens which are not invalidated by a bankruptcy adjudication are entitled to plenary suits.

(c) Where adverse claims arise from a levy, judgment, attachment or other lien obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a bankruptcy petition, which are deemed null and void in case such person is adjudged a bankrupt under Section 67F of the act, such claims are cognizable by the Bankruptcy Court in a summary proceeding.

As we pointed out at the beginning of our argument, the petitioner has confused the cases dealing with the claims of adverse title to property based upon transfers antedating the bankruptcy with proceedings under Section 67F of the Bankruptcy Act. Practically all of the cases, which the petitioner cites as analogous authorities supporting its position, relate to claims of adverse title to property based upon transfers antedating the bankruptcy. Two of the cases deal with

liens in the nature of a pledge, which are not invalidated or in anywise affected by an adjudication in bankruptcy. None of the cases cited touch the question of whether the Bankruptcy Court has the power to summarily enforce the provisions of Section 67F of the present Act.

Before proceeding with a discussion of the cases, it may not be amiss to consider the reason for the rule which these cases establish. The many decisions of this Court and other courts, which hold that a stranger to the bankruptcy proceedings having more than a merely colorable claim of adverse title to property transferred to him before the bankruptcy cannot be brought into the Bankruptcy Court against his will and compelled to submit his claim for summary adjudication, rest upon the proposition that Congress did not confer upon the Bankruptcy Court, either under the Bankruptcy Act of 1867 or under the present Act of 1898, the power to subject such strangers to the proceedings, who had both title and possession of property transferred before the bankruptcy and whose claim of title was more than colorable, to the summary process of the Bankruptcy Court. Congress did provide a forum for the determination of such claims. Section 23 of the present Act prescribes the Courts which shall have jurisdiction of all controversies at law or in equity as distinguished from proceedings in bankruptcy between trustees and such adverse claimants. It is not difficult to understand why Congress did not extend the summary power of the Bankruptcy Court to controversies arising from adverse claims of title based upon transfers antedating the bankruptcy. The Bankrupt had parted with title and possession. Before the trustee could become entitled to the property affected by these transfers he must

first set aside the transfer. If he failed to do so, title remained in the transferee, and there was no reason for placing the trustee in such a controversy in any more favorable position than any other litigant and in giving him a right to a summary proceeding when another litigant under similar conditions would have been required to commence a suit at law or in equity. Neither was there any reason for abridging the rights of a transferee who had shown that his claim was more than colorable to the extent of rendering him amenable to the summary process of the Bankruptcy Court. In the case of an adverse claim arising under a levy, judgment, attachment or other lien obtained through legal proceedings against any person who was insolvent at any time within four months prior to the filing of the petition in bankruptcy, which by the express provisions of Section 67F becomes null and void upon the adjudication, the situation is wholly different. There the title in the property still remains in the Bankrupt. It furnishes a part of the bankrupt estate, subject only to the lien, which becomes null and void. It is the bankrupt's property with which the Court is dealing, not the property of a transferee. No reason or right exists for according to a claimant under such a lien a plenary suit to determine whether the lien shall be deemed null and void or survive the adjudication. The Bankruptcy Court in such a case is dealing with property of the bankrupt estate over which it is given full control, including the right to determine the extent and validity of any liens.

There seems to be but a single exception to this rule and that is in the case of liens (accompanied by possession) not nullified by the bankruptcy adjudication and where the holder of the lien has the right to

retain the property despite an adjudication. The most common example of this character of lien is a pledge or a seizure by a landlord on a distraint for rent.

If the distinctions pointed out are borne clearly in mind, it is a comparatively simple matter to explain the apparent diversity of view in the numerous cases.

Thus, in the cases of:

Smith v. *Mason*, 14 Wall. 419;
First National Bank of Chicago v. *Chicago Trust Co.*, 198 U. S., 280;
Bardes v. *Hawarden Bank*, 178 U. S., 524;
Louisville Trust Co. v. *Comingor*, 184 U. S., 18;
Weidhorn v. *Levy*, 253 U. S., 268;
Galbraith v. *Vallely*, 256 U. S., 46;
Yorkville Coal Co., 211 Fed., 619;
Midtown Contracting Co., 243 Fed., 56;
In re Rudnick, 160 Fed., 903;

cited by the petitioner as authorities sustaining its position, it will be found that each dealt with an adverse claim *of title* based upon a transfer antedating the bankruptcy. In the cases of *Mueller* v. *Nugent*, 184 U. S. 1, and *Babbitt* v. *Dutcher*, 216 U. S. 102, the rule of the foregoing cases is confirmed but the Court confines such rule to instances where the adverse claims asserted are not merely colorable, and holds that the Bankruptcy Court has the right preliminarily to inquire whether an adverse claim is merely colorable and if so to deal summarily therewith.

In the last mentioned case, Mr. Chief Justice Fuller again classifies the cases where a plenary suit must be brought and affirms that it is where a claim *of adverse title* to property of a bankrupt based upon a transfer

antedating the bankruptcy is asserted, which is not merely colorable, that a plenary suit must be brought either in law or in equity by the trustee. In none of the cases referred to, which came before this Court, either under the Bankruptcy Statute of 1867 or under the present Act of 1898, has it been said that the doctrine of the cases holding a plenary suit necessary extended to a mere claim of lien nullified by a bankruptcy adjudication if obtained within four months and at a time when the bankrupt was insolvent, such as is presented in the case at bar. There manifestly could not have been such a ruling with regard to the cases under the Act of 1867 because, as has been pointed out, that Act contains no such section as Section 67F of the present Act. Despite these facts, the petitioner, at pages 13 to 19 of its brief, argues that some of the cases decided under the Bankruptcy Act of 1867, and particularly the case of *Marshall* v. *Knox*, 16 Wall. 551, furnish authority in support of its position. In advancing this contention, the petitioner has fallen into error. The case of *Marshall* v. *Knox*, *supra*, was a case where a Sheriff had seized certain property of a tenant at the instance of the landlord, pursuant to a right conferred by the Louisiana Statute to distrain for rent. The seizure took place on January 6th, 1868 and on January 15, 1868, the tenant filed a voluntary petition in bankruptcy. The assignee in bankruptcy thereupon obtained from the Bankruptcy Court a rule or order upon the lessor and the sheriff to show cause why they should not deliver up the property to the assignee on the ground that various creditors of the bankrupt asserted claim on the property, and that it was necessary for the proper adjustment of all claims that possession should

be surrendered to the assignee and be subject to the Bankruptcy Court. The landlord contested the assignee's application and claimed possession of the property for the purpose of realizing thereon the amount of his rent. The Court, nevertheless, without any proof on the subject made the rule absolute. This procedure of the Bankruptcy Court was criticized and the order of that Court reversed upon the ground that the District Court was without jurisdiction to take away the property held by the Sheriff "as a pledge for rent of the lessor." This case is totally dissimilar from the case at bar in every conceivable respect and cannot furnish the slightest authority for the position of the petitioner in this proceeding. In the first place, as already stated, the Bankruptcy Act of 1867 contained no provisions similar to or parallel with those of Section 67F of the present Act, and therefore, there could be no proceeding brought in the District Court to nullify a lien which became invalid upon the Bankrupt's adjudication. In the second place, the lien of the lessor was wholly different from the lien of the petitioner in this proceeding. The Louisiana Statute gave the lessor the right to hold the property distrained as a pledge for his rent. This right remained unaffected by the Bankrupt's adjudication. Regardless of whether the Bankrupt was insolvent at the time of the seizure or not, the landlord was entitled to retain the property seized until his rent had been paid. There was no warrant for requiring the lessor or the sheriff to release the property held by them to the assignee in Bankruptcy. Whether the creditors of the Bankrupt claimed a privilege on the property or not, the Bankrupt estate could have no interest in that property until the landlord's rent had been paid. His right to hold

the goods was absolute at all times and the Bankruptcy Court was without power to deprive him of his right. It was as though a Bankrupt had made a loan from a third party and pledged security for the repayment thereof and then a proceeding was brought by the Trustee to recover the pledged collateral upon the ground that certain other creditors were claiming rights therein. Neither under the present Bankruptcy Statute nor under the previous Statute would the Bankruptcy Court or any other Court have the right, summarily or otherwise, to take away from such a creditor security to which he had an absolute right until the amount of his debt had been paid.

Despite these essential points of difference between *Marshall* v. *Knox, supra*, and the instant case, the petitioner still argues the availability of the former as an authority under the present bankruptcy Act because of a statement made by Mr. Chief Justice Fuller in the case of *First National Bank of Chicago* v. *Chicago Trust Company, supra,* that

> "the present Act (of 1898) was plainly framed in recognition of the principle of these cases. (Referring to *Smith* v. *Mason, supra,* and *Marshall* v. *Knox, supra.,* etc.)

An examination of Mr. Chief Justice Fuller's opinion plainly shows that this remark was intended to indicate that the Bankruptcy Statute of 1898 recognized the principle, which also applied under the Act of 1867 with regard to the distinction between steps in Bankruptcy proceedings proper and controversies arising out of the settlement of Bankruptcy estates, and that this distinction prevents the Bank-

ruptcy Court from summarily proceeding against an adverse claimant of title to property based upon a transfer antedating the bankruptcy. That was the proposition in the case which Mr. Chief Justice Fuller was considering when he used the language quoted. There was not presented in that case the question of proceedings for the enforcement of Section 67F of the present Bankruptcy Statute. What was involved was the question of the power of the Bankruptcy Court to deal with property which prior to the Bankruptcy had been transferred to the First National Bank of Chicago and in which that Bank was claiming title adversely to the Trustee. So, too, the statement in Mr. Chief Justice Fuller's opinion that it was settled under the earlier Act that the Bankruptcy Court was without jurisdiction to determine adverse claims to property not in the possession of the assignee in bankruptcy, by summary proceedings, whether absolute title or only a lien was asserted, is undoubtedly correct. But this language must be considered in connection with the Act of 1867 and cannot be applied to a Section of the present Act, which has no counterpart in the earlier Statute. Moreover, there was no case arising under the earlier Act involving a lien of a levy under execution. The only case of a lien of any kind which arose under the Statute of 1867 was the landlord's lien for rent which this Court in *Marshal* v. *Knox* (Trans. pp. 555-556) compared to a pledge.

That the language of Mr. Chief Justice Fuller regarding the lack of power of the Bankruptcy Court to deal in a summary proceeding with an adverse claim of lien does not apply to the present Statute when the lien is of a character nullified by the bankruptcy adjudication must be clear from the later decision of

this Court in *Clarke* v. *Larremore, supra,* where as already pointed out, this Court upheld the summary power of the Bankruptcy Court to enforce Section 67F of the Act. It cannot be assumed that in deciding this last mentioned case the Court entirely overlooked its decision in *First National Bank of Chicago* v. *Chicago Trust Company, supra.* It is clear that this last mentioned case was not referred to because it concerned an entirely different state of facts, calling for the application of different principles of law.

Under the present Bankruptcy Act, one case of an adverse claim of lien did arise and that is the case of *Jacquith* v. *Rowley,* 188 U. S., 620. There a certain person had furnished a bond for the Bankrupt and had received from the latter certain security to indemnify him against loss. The Trustee in Bankruptcy sought by summary proceedings to recover from the transferee the security deposited by the Bankrupt. It was held by this Court that the District Court did not have jurisdiction to entertain such a proceeding. This case furnishes a good example of a lien not nullified or affected by a bankruptcy adjudication where, as in *Marshal* v. *Knox, supra,* the Court held that the Bankruptcy Court did not have power to summarily adjudicate the adverse claim. It is submitted that this case furnishes no authority for the petitioner's contentions because the lien involved was one not affected by bankruptcy proceedings and which the trustee could not set aside whether he proceeded in the Bankruptcy Court or in the State Court.

Decisions in Circuits Other than the Second Circuit, Cited by Petitioner, Considered.

Petitioner under Point II of its brief refers to three cases, not previously discussed in this brief, to support its position:

Martin v. *Oliver*, 260 Fed., 89;
Stone v. *Mark*, 227 Fed., 975;
Re: Ann Harbor Machine Corporation, 278 Fed., 749.

In the case of *Martin* v. *Oliver*, certain property covered by a chattel mortgage had been taken by a Receiver of the Chancery Court of Logan County, Arkansas, in a foreclosure proceeding commenced on or about November 8th, 1917, against one Lula M. Oliver. This debtor claimed that the property seized by the Receiver was exempt from levy or sale. On February 8th, 1918, a decree was made in favor of the plaintiff against Lula M. Oliver disallowing the claim of exemption and requiring the Receiver to sell the property and apply the proceeds to the payment of the judgment. On January 23rd, 1918, Lula M. Oliver filed a voluntary petition in bankruptcy. The first meeting of creditors came on before the Referee on February 8th when "without notice to, or any application for, or demand of the property from the Chancery Court or its receiver, Martin, the Referee made his determination that the property in controversy was exempt, and ordered it delivered to Lula M. Oliver." This order was affirmed by the District Court, and thereupon a petition to revise taken to the Circuit Court of Appeals for the Eighth Circuit. That Court reversed the same upon the ground

that the Referee was without jurisdiction to make the order complained of. The proceeding was plainly one not brought under Section 67F, but was merely a proceeding of a Bankrupt to obtain an exemption of property which the State Court had previously decided was not exempt. Indeed, the Court is careful to point out that only those adverse claimants whose liens attach within four months prior to the filing of the petition in bankruptcy and which are not conditioned by the insolvency of the debtor at the time the liens attached, have the rights and privileges of adverse claimants, because such liens are excluded from the provisions of Section 67F and are entitled to a plenary suit. Judge Sanborn, who wrote the prevailing opinion, said:

> "An adverse claimant whose lien attaches within four months prior to the filing of the petition in bankruptcy and which is not conditioned by the insolvency of the debtor at the time such lien attached, has all the rights and privileges of an adverse claimant whose lien attached more than four months before the filing of the petition, because it is excluded from the provisions of section 67F and is entitled to the trial of its claim in a plenary suit."

It seems to us that this case is a complete recognition of the principle for which we contend, that lienors whose liens are embraced by Section 67F are in a different position from those lienors or claimants who are entitled to plenary suits and that they may not claim the right to such plenary suit but remain subject to the summary power of the Bankruptcy Court.

In the case of *Stone* v. *Mark, supra,* the Sheriff had not only made the levy, but had paid the money over to the judgment creditor before any proceeding was commenced by the Trustee to recover the money, so that there was neither title nor possession, actual or constructive, in the Bankruptcy Court, or its officers when the proceeding was initiated. No question of the invalidity of a lien was involved, and the Court used the following language, indicating, in our opinion, that if the proceeding was under Section 67F of the Act a plenary suit would not be ordered.

> "Nor is such a claimant who does not fall under the provisions of Section 67F deprived of his right to an opportunity to prosecute or defend his claim in a plenary suit by the fact that his lien was acquired within four months of the filing of the petition in bankruptcy."

Petitioner in its discussion of this case attempts to explain the language of the Court quoted as meaning only that the execution creditor could not be deprived of a plenary suit so long as there was any claim that the Bankrupt was solvent when the lien was obtained. We cannot find any basis for this interpretation, nor is petitioner's explanation clear. In our view of the matter, the Court in using the language referred to plainly intended to infer that the case before it did not fall within the scope of Section 67F, but rather fell in the category of claims of adverse title upon a transfer antedating the bankruptcy. This view is fortified by the fact that in the case of *Martin* v. *Oliver, supra,* decided by the same Court, precisely the same exception was made with regard to cases falling under the provisions of Section 67F.

The Court could not have inadvertently misstated its position in two successive cases. We are not stopping to consider the correctness of the Court's ruling with regard to the class of claimants who do not fall under the provisions of Section 67F, and who are entitled to a plenary suit. Some of the conclusions of the Court in regard to that matter are out of harmony with authorities in other circuits. Judge Hough, in his opinion, questioned the soundness of the classification of claims in which a plenary suit must be brought set up in *Martin* v. *Oliver*, *supra* (Trans. p. 46). It is sufficient for the purposes of this case that upon the point of the power of the Bankruptcy Court to deal by summary order with applications to enforce Section 67F, even this Court has not questioned the existence of such power.

In the case of *In re Ann Harbor Machine Corporation*, *supra*, the matter before the Court was an application to set aside an adjudication in bankruptcy, and the remark by the Court that an execution against the Bankrupt obtained within four months of the date of the bankruptcy and at a time when the Bankrupt was insolvent can only be dissolved by a plenary suit, was mere dictum and not the question before the Court.

Clearly, these cases can furnish no authority for the petitioner's contentions.

POINT III.

The petitioner's argument that it was a stranger to the bankruptcy proceedings and for that reason the Bankruptcy Court could not obtain jurisdiction over it is wholly unsound.

Evidently, designing to bring itself within the purview of the cases dealing with claims of adverse title to property based upon transfers antedating the bankruptcy, where this Court has used language indicating that such claimants being strangers to the bankruptcy proceedings could not have their rights summarily disposed of by the Bankruptcy Court, the petitioner devotes considerable space in its brief in attempting to establish that it, too, was a stranger to the bankruptcy proceedings herein. In the view which we take of the power of the Bankruptcy Court to deal with liens affected by Section 67F of the Bankruptcy Act, it is wholly immaterial whether the petitioner technically was or was not a stranger to the bankruptcy proceedings. If we are correct in our contention that the Bankruptcy Court has power to inquire into and determine the existence and validity of liens embraced in the Section of the Bankruptcy Act under discussion, the Referee in Bankruptcy had the power to issue the rule to show cause and to conduct the inquiry as to the existence of a state of solvency on the date of the judgment and levy. Nevertheless, if it should become material to a decision in this case to determine whether the petitioner was in reality a stranger to the bankruptcy proceedings, an

examination of the records of the Bankruptcy Court will conclusively establish that the petitioner not only was not a stranger to the bankruptcy proceedings, but voluntarily appeared in those proceedings and actively participated therein. Nor was this appearance confined to resisting the efforts of the Respondents to nullify the petitioner's lien. The petitioner, as we have already pointed out in our Statement of Facts, appeared in the Bankruptcy Court and applied for and obtained an order to conduct an examination of the Bankrupt under Section 21-A (Trans. p. 5). Thereupon, the petitioner conducted a protracted examination. During the progress of this examination the petitioner made a motion to adjudge certain of the officers of the Bankrupt in contempt, which motion failed. Another motion made by the petitioner was to vacate the adjudication entered upon the voluntary petition of the Bankrupt upon the ground that it was not entitled to have itself adjudicated. This motion also failed. As the papers upon these last mentioned two motions were not a part of the proceedings which came before the Circuit Court of Appeals, these papers are not printed in the record, but they constitute a part of the file of the District Court and no denial can be made by the petitioner of their contents. Are these steps consistent with a plea that the petitioner remained a stranger to the bankruptcy proceedings and that the Court, regardless of the provisions of Section 67F of the Act, could obtain no jurisdiction over it? It would be impossible to conceive of a situation where a creditor had by its own acts rendered itself more of a party to a bankruptcy proceeding.

Conclusion.

Under Point VII of its brief, the petitioner argues that this Court in deciding the question presented should not be influenced by any considerations of speedy administration of the Bankruptcy Act and convenience of the litigants. We must dissent from such an argument. Assuming the question of the Bankruptcy Court's jurisdiction to enforce Section 67F to be an open one, we cannot believe that this Court will remain oblivious to the considerations of public interest in the speedy and economical enforcement of the Bankruptcy Act. The record of this case furnishes abundant evidence of the results which would flow from a ratification of the petitioner's position. Under the ruling of the District Court that the Bankruptcy Court lacked jurisdiction the petitioner was able from August 15th, 1922 to May 5, 1923, to keep the Sheriff and his deputies in the Bankrupt's place of business in possession of the merchandise seized under the levy, to run up a huge bill for fees and expenses and to paralyze the administration of the Bankrupt's estate by the Bankruptcy Court through its Trustees. Had it not been for the intervention of Judge Hand's order allowing a sale of the assets and ousting the Sheriff upon the deposit with him of the full amount of the petitioner's claim, which order the petitioner sought to prohibit in this Court, the Sheriff would still be in possession of the assets levied upon and by the time a plenary suit was reached for trial on the clogged calandars of the State Courts of New York, it is by no means inconceivable that the Sheriff's charges alone would account for a large part of the value of the total assets. Any creditor seek-

ing to thwart the will of all other creditors interested in the speedy administration of a bankrupt estate could, under the procedure contended for by the petitioner, assert a claim of solvency, however unfounded in fact, and compel the Trustee and the other creditors to stand by an almost indefinite length of time until such claim is reached for trial upon the calendar of the State Court and is then ultimately reviewed by the Appellate Court of last resort. Such a situation is well nigh intolerable. The Bankruptcy Statute which was designed in the interests of a speedy and effective administration of a debtor's assets, and which contains elaborate machinery for permitting a fair and just settlement by a Bankrupt with his creditors, could be frustrated and, indeed, nullified, if any selfish creditor, seeking to obtain full payment for himself could, as in the case at bar, take a stand against any efforts of the other creditors to make a settlement or have a sale while a simple issue of solvency awaits trial. Such a plan could be used by unscrupulous creditors to prevent speedy compositions or a prompt distribution of dividends. Considering only the case at bar, all of the creditors except the petitioner, and including some of the largest and most important banks in New York City, after a careful investigation into the Bankrupt's affairs, concluded to accept a settlement of 57-½%. The petitioner stood out for 100% on the plea that the Bankrupt was solvent, and when its efforts to obtain a preference were resisted, came into Court and charged the petitioning creditors and other creditors with having colluded with the Bankrupt in bringing about the filing of the involuntary petitions and the voluntary petition so as to defeat the petitioner's rights. In other words, the petitioner sought to have the District Court be-

lieve that the other creditors holding claims in the aggregate in an amount far exceeding the petitioner's claim had colluded with the Bankrupt in order to obtain for themselves 57-½% when the Bankrupt was well able to pay 100%. The absurdity of this contention is a fair index of the merits of the petitioner's claim. The right of the Bankruptcy Court to deal summarily with a situation such as was here presented effectually prevents the Bankruptcy Act from being used as an instrument of oppression and delay on the part of individual creditors who obtain judgments and seek to get preferences therefrom. It provides a speedy, economical and effective administration of the Bankruptcy Act with complete fairness to all. Even this petitioner has not attempted to argue that the summary proceeding in the Bankruptcy Court did not afford a full opportunity for a fair trial of the issue of solvency or that the Bankruptcy Court is less able to pass upon such an issue than a judge in the State Court, or that the Federal Appellate Courts cannot be relied upon to safe-guard the interests of judgment lien creditors to an equal extent with the State Appellate Courts. If the question be an open one, what possible purpose could be served in taking away from the Bankruptcy Court, which was organized to administer the Bankruptcy Act, the power to pass upon so simple an issue as the question of solvency and transfering the trial of that issue to the State Court?

The term "summary proceeding" is sometimes misunderstood as a proceeding decided upon affidavits without affording the parties an opportunity to present their proofs. In fact, nothing could be more incorrect. A trial before the Referee upon the issue of solvency is handled in precisely the same way as

a trial before a State Court. Both hear the proofs of the parties and make their decision. In both cases the decision thus rendered is subject to appeal and review. Is there any reason, under these circumstances, to adopt a course of procedure which retards the speedy and effective administration of a Bankrupt estate in favor of the economical method approved by the Court below. The petitioner avoids a discussion of these considerations and falls back upon statements as to fundamental principles of jurisdiction and due processes of law. We are unable to apprehend how a fair trial before an experienced Referee in Bankruptcy invades any fundamental principles of jurisdiction or due processes of law. Had the issues raised by the filing of the first involuntary petition been prosecuted to trial, under the practice prevailing in the Southern District of New York the Referee would have decided such issues and his decision would have been binding upon the petitioner on the claim of solvency. Would the petitioner then be heard to argue that it had not had the benefit of due process of law?

It is respectfully submitted that upon the authorities and upon every principle of expediency and justice, the decree of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

DAVID W. KAHN,
Attorney for Respondents.

Office Supreme Court, U. S.
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Supreme Court of the United States,

OCTOBER TERM, 1923—NO. 188.

TAUBEL-SCOTT-KITZMILLER CO., INC.,

Petitioner,

—against—

DAVID J. FOX, REGINALD P. BOYD and EUGENE S. BENJAMIN, Trustees in Bankruptcy of COWEN HOSIERY CO., INC.,

Respondents.

REPLY BRIEF OF ARGUMENT ON BEHALF OF PETITIONER.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF OF ARGUMENT ON BEHALF OF PETITIONER.

Statement.

The Petitioner asks leave to file this reply brief so that it may render all possible assistance to the Court in clarifying its position with regard to certain contentions raised by the respondents in their brief.

In the first place, it should be called to the Court's attention that the respondents have apparently found it necessary time and again throughout their brief to refer to dealings, negotiations, and transactions nowhere of record and to proceedings in the District Court had both before and since the entry of the decree which is here on appeal before this Court, and the rec-

ord of which in no wise appears in the printed transcript upon which this appeal is being heard. For the Petitioner to enter into a controversy as to the purport or effect or character of such matters, which are not here before the Court, would seem a futile proceeding and scarcely in accordance with orderly practice.

The negotiations of a Creditors' Committee for an extension of time, as referred to on page 3 of the respondents' brief, a very limited transcript of the opinion of a Referee, as referred to on page 9 of the respondents' brief, the obtaining of an order for an examination under Section 21a, as referred to on page 11 of the respondents' brief (which it might be well to note was not obtained in the voluntary proceeding at all but in the involuntary proceedings which preceded it), a motion to vacate an adjudication is also referred to on page 11 of the respondents' brief, the settlement made by an entirely different company, as referred to on page 14 of the respondents' brief, and the entire conclusion of the brief, on pages 52, 53 and 54, referring as they do to a certain compromise made by the bankrupt with its creditors not being in any way before this Court, or a part of the record, argument based upon such statements and supposed state of facts seems scarcely to be required. Other than by producing the records themselves before this Court and by an examination of witnesses and documents as to the matters referred to by the respondents, which are not even matters of record in any court this Court could not obtain a complete view of the matters referred to by the respondents. Their entire immateriality, however, may well be comprehended from the very significant circumstance that respondents' able

counsel did not see fit to incorporate them in the record before the Court below.

The consideration of the argument made by the respondents seems fairly to fall under three heads.

In the first place, the respondents here concede that which they denied in their brief in the Court below, that is to say, that the Sheriff took possession of the property levied upon and continued in possession thereof (Respondents' Brief, pp. 4-5). Nevertheless we shall see that they have cited to the Court certain authorities justifying summary procedure where that very summary procedure was predicated upon possession not in the adverse claimant but in the trustees themselves. The first head under which the respondents' brief will, therefore, be considered will be with regard to possession.

The second head has to do with the question of solvency or insolvency. The record before this Court amply justifies the Petitioner's position that it has made a substantial showing of solvency on the part of the bankrupt at the date of the entry of its judgment. Nevertheless the respondents in numerous portions of their brief have cited authorities based upon a state of facts where insolvency was either presupposed in the consideration of the Court or had definitely been judicially established before a court having jurisdiction of the controversy.

The third head has to do with the question of jurisdiction pure and simple. The respondents, as somewhat anticipated in Petitioner's brief, have contended that the language of Section 67, subdivision f, specifically confers jurisdiction upon the Referee to make the order to show cause which brought before him the question of validity or invalidity of respondents' lien. This argu-

ment is asserted at such great length in the respondents' brief and with such apparent seriousness that additional aspects of the matter must be considered. After considering those authorities referred to by the respondents, which fall under these three heads, the Petitioner in this brief will briefly discuss the other miscellaneous authorities referred to by the respondents, and, it is believed, demonstrate that they form no obstacle to the Petitioner's position.

Possession.

As above pointed out, the respondents now concede that possession of the property levied upon was in the Sheriff and, of course, could not have been in the Trustees (Respondents). It is clear, therefore, that the quotation set forth at page 28 of the respondents' brief from Black on Bankruptcy can have no possible applicability for it specifically determines:

> "The Court of Bankruptcy has jurisdiction to inquire into and determine the validity, extent and priority of liens asserted upon any property of the bankrupt *which has come into its actual or constructive possession.*"

Likewise, no authority is afforded to the respondents' position by the case of *Murphy* v. *John Hoffman & Co.*, 211 U. S. 562, which is cited at page 33 of the respondents' brief. This is obvious by the very first sentence of the quotation there set forth, as follows:

> "But where the property in dispute *is in the actual possession of the Court of Bankruptcy* there comes into play another

> principle not peculiar to the Courts of Bankruptcy, but applicable to all courts, Federal or State."

This question of possession has an importance in the questions here before the Court which it is indeed difficult to overemphasize. The respondents have attempted to convince the Court, at pages 16 and 37 of their brief, that the Petitioner is confused in drawing an analogy between such cases as that at bar and suits by trustees against those holding under "an adverse claim of title". As a matter of fact, this Court and the other learned courts which have considered this class of cases have never been concerned with the nature of the adverse claim actually asserted; whether that adverse claim was one of title or whether it was an adverse claim to possession, whether the adverse claimant asserted title absolute or a mere lien. No clearer language upon this point could be pictured than that appearing in *Marshall* v. *Knox*, 16 Wall. 551, where the Court said (p. 557):

> "But it may, with some plausibility, be said that, as the property in this case is conceded to be in the bankrupt, and the question has respect only to the right of possession under the lien, the District Court, which has express jurisdiction of 'the ascertainment and liquidation of liens and other specific claims' on the bankrupt's property, might properly assume control of the property itself. The claim, however, is to the right of possession, and that right may be just as absolute and just as essential to the interests of the claimant as the right of property in the thing itself, and is, in fact, a species of property in the thing just as much the subject of litigation as the thing itself."

This Court has approved the foregoing case in *First National Bank of Chicago* v. *Chicago Title & Trust Co.*, 198 U. S. 280, where Mr. Chief Justice Fuller said (p. 289):

> "It was settled that the Bankruptcy Court was without jurisdiction to determine adverse claims to property, not in the possession of the assignee in bankruptcy, by summary proceedings, whether absolute title or *only a lien was asserted.*"

Respondents, however, while admitting that as to certain liens and pledges the trustees must proceed by plenary suit (pp. 37-38 of Respondents' Brief), argue that such is the case only because such liens and pledges are not "invalidated or in any wise affected by an adjudication in bankruptcy". They argue, based upon this reasoning, that an analogy cannot be drawn between such cases and the case at bar. The respondents' reasoning, however, entirely overlooks the circumstance that in the case at bar if the Cowen Hosiery Co., Inc., was acutally solvent then Petitioner's lien is as little affected by the adjudication in bankruptcy as any pledge. Their argument, therefore, entirely begs the question as to the forum which has jurisdiction to pass upon this very question as to whether or not petitioner has a lien which is or which is not affected by the adjudication. The question of the validity of such a lien, and whether such a lien survives adjudication, is as much a question to be determined in a plenary suit as a question whether a pledge has been properly made or was attended by such formality as effectually to vest in the pledgee a right superior to the right of a trustee in bankruptcy. A further consideration of this argument more properly belongs under the following head.

Solvency or Insolvency.

The respondents have reviewed (pp. 13 to 15 of Respondents' Brief) the evidence of solvency adduced by the Petitioner before the District Court, and they have argued the question as to whether such evidence is conclusive. They have set off this evidence against the statement made by the respondents in the petition upon which the Referee's order to show cause was based, that the bankrupt was insolvent on the date of the Petitioner's judgment. In adducing evidence that the Cowen Hosiery Co., Inc. was solvent on the date of the judgment the Petitioner was not concerned in producing conclusive proof of such solvency. It was concerned only in calling such facts to the Court's attention as would demonstrate beyond question that there was a very substantial ground for Petitioner's contention that the Cowen Hosiery Co., Inc., was solvent on the date of its judgment, and that its claim in that regard was not colorable. The Petitioner recognized that the District Court could not be concerned in offsetting the one statement of the facts against the other. Any argument upon the record, therefore, which assumes either that insolvency has been conclusively demonstrated or that solvency has been conclusively demonstrated naturally is founded upon a false premise. Upon such false premise is based the entire argument of the trustees in that portion of their brief (pp. 39-40-41) where the authorities cited in the Petitioner's principal brief are considered. Thus, at page 39, the respondents' presupposed an insolvent condition on the part of the Cowen Hosiery Co., Inc., at the date when Petitioner's judgment was

entered. The vice of this reasoning, however, appears most clearly in the discussion by the respondents of the two cases of *Martin* v. *Oliver* and *Stone* v. *Mark* (pp. 46 to 49 of respondents' brief). The respondents quote, at page 47, the following language of the Court in *Martin* v. *Oliver,* 260 Fed. 89:

> "An adverse claimant whose lien attaches within four months prior to the filing of the petition in bankruptcy, and which is not conditioned by the insolvency of the debtor at the time such lien attached, has all the rights and privileges of an adverse claimant whose lien attached more than four months before the filing of the petition, because it is excluded from the provisions of Section 67-F and is entitled to the trial of its claim in a plenary suit."

The respondents entirely overlook that phrase which is really the cardinal feature of the Court's decision—the phrase "and which is not conditioned by the insolvency." In other words, the language of the Court in *Martin* v. *Oliver* means only this: that if a judgment is recovered within four months prior to the filing of the petition *and there is not an attendant condition of insolvency,* then, of course, the judgment does not fall within the provisions of Section 67, subdivision F, and, therefore, the judgment forms a valid lien. The respondents also quote (p. 48 of respondents' brief) the following language from *Stone* v. *Mark,* 227 Fed. 975:

> "Nor is such a claimant who does not fall under the provisions of Section 67-F deprived of his right to an opportunity to prosecute or defend his claim in a plenary

> suit by the fact that his lien was acquired within four months of the filing of the petition in bankruptcy."

The respondents seek to distinguish the language of these two cases from the present case upon the premise that these cases deal with judgments which do not fall within Section 67, subdivision F, of the Bankruptcy Act, whereas the judgment in the case at bar *does* fall, they assume, within Section 67, subdivision F, of the Bankruptcy Act. Such argument entirely begs the question and overlooks the principal problem here before the court. They overlook the fact that the main contest between the Petitioner and the respondents is that very question—does respondents' judgment fall within Section 67, subdivision F, or does it not fall within that subdivision? The respondents claim it does fall within that subdivision, because they claim that the Cowen Hosiery Co., Inc., was insolvent at the time within four months before the filing of the petition when the judgment was entered. The Petitioner claims that it does not fall within Section 67, subdivision F, because the Cowen Hosiery Co., Inc., was not insolvent but was indeed solvent on the date when the judgment was entered. The question here before the Court is simply this: where the trustee in bankruptcy claims that a certain judgment is within Section 67, subdivision F, and the judgment-creditor claims that the judgment is not within Section 67, subdivision F, must that question be tried in a plenary suit or may it be tried in a summary manner before a Referee? *Stone* v. *Mark* and *Martin* v. *Oliver* are clear determinations by the Circuit Courts of Appeals, which decided these cases, that such question is one for a plenary suit.

Jurisdiction.

The Respondents have devoted much space to the argument that certain language in Section 67, subdivision F, justifies a summary disposition of an adverse claim attacked under that section, although, admittedly, adverse claims attacked under other subdivisions of Section 67 can only be assailed in a plenary suit brought in a court having jurisdiction of the controversy. This argument has already been somewhat anticipated in Petitioner's principal brief (pp. 32 to 34), and this Court will not be burdened by any repetition of what has there been said upon the subject. For the Court's convenience, however, the language of this important subdivision is here again quoted in full:

> "*f.* That all levies, judgment, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the Court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the Court may order such conveyance as shall be necessary to carry the purposes of this section into effect: Provided, that nothing herein contained shall have the ef-

> fect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a *bona fide* purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

Merely to recall the Respondents' argument upon this point, it is their contention that the following language confers a summary jurisdiction upon the District Court:

> "And the Court may order such conveyance as shall be necessary to carry the purposes of this section into effect."

To recapitulate only the argument made on this point in the Petitioner's principal brief, we may say that it is the intention of the section that in the event a judgment-lien has been invalidated the Court shall have discretion to make one of two dispositions of the property, (a) the property may be freed from the lien and returned to the trustee, (b) the property may be continued under the lien and the lien itself transferred to the trustee. The Bankruptcy Court has the discretion once the invalidity of the lien has been properly determined in a proper court to make either disposition. For example, if we may assume that the instant case will be sent for trial to the State Courts of the State of New York, and if we may assume that a judgment in favor of the trustees and adverse to the Petitioner will be entered, then the Bankruptcy Court may either, under the above quoted sentence, direct the Sheriff to transfer back the property to the trustees or it may make an order directing this Petitioner to transfer its execution-lien to the trustees. The language relied upon by the trustees goes no further than to authorize the making of such order by the

District Court. Mere comparison of the language in subdivision *f* which is relied upon by the respondents with the language used by Congress in Section 23, and in the last sentence of Section 67, subdivision *e*, is sufficient to convince that Congress in subdivision *f* did not intend to make a new jurisdictional provision. The language is not appropriate for such purpose.

A further consideration, however, of this question of jurisdiction renders the incorrectness of respondents' position manifest. The respondents state (p. 22 of Respondents' Brief) that the Bankruptcy Act provides that as to subdivisions *a*, *b*, *c*, *d*, and *e* of Section 67 a plenary suit lies. They state:

> "Thus, a proviso was made at the very end of subdivisions *a*, *b*, *c*, *d* and *e* of Section 67 that 'for the purpose of such recovery any Court of Bankruptcy as hereinfore defined, and any State Court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction' ".

This statement is incorrect, if not decidedly misleading. The Court will not be burdened here by a quotation of all of Section 67 of the Bankruptcy Act. A very cursory reference to that section, however, renders it apparent that the quoted language does not, as the respondents say, appear as a part of subdivisions *a*, *b*, *c*, *d* and *e* but appears only as a part of subdivision *e*. This provision is necessary to correlate with subdivision *b* of Section 23 of the Bankruptcy Act where it has specifically provided that under subdivision *e* of Section 67 State and Federal Courts shall have concurrent jurisdiction. The respondents (p. 22 of Respondents' Brief) fallaciously argue that if it had been the intention of Con-

gress to require a plenary suit in order to enforce the provisions of subdivision F of Section 67 of the Act, the proviso above quoted would have appeared after subdivision *f* instead of after subdivision *e*. It is obvious why the proviso appeared not *after* subdivision *e but as a part of* subdivision *e*. The reason is, that by the amendment of 1903 Federal Courts were given concurrent jurisdiction over suits under subdivision *e*, so that actions might be brought either in the Federal or in the State Courts. The Respondents continue (p. 22 of Respondents' Brief):

> "The very fact that the forum for the enforcement of subdivisions *a*, *b*, *c*, *d* and *e* is specifically designated, whereas in connection with subdivision F, it is provided that the Bankruptcy Court may order such conveyance as shall be necessary to carry the purposes of that section into effect, plainly discloses the intention to differentiate between the various characters of proceedings embraced by Section 67 and to confine the power of enforcement of Section 67F to the Bankruptcy Court, where naturally and properly it belongs and where machinery exists for its speedy administration."

We have seen that the Act does not, as the Respondents assume, specify the forum under sections *a*, *b*, *c*, *d* and *e* of Section 67. It is only in subdivision E that the concurrent jurisdiction of the Federal and of the State Courts is reaffirmed. This language of reaffirmance, however, be it noted, was not for the purpose of conferring jurisdiction upon the State Court. It was found necessary to amend the law in 1903 not in order to grant jurisdiction to the State Court but indeed to confer upon the Federal Court even the right to grant a remedy concurrent with that afforded by

the State Court. The importance of this consideration Petitioner believes is manifest. Such a controversy, as here exists, between the trustees in bankruptcy and a judgment-creditor is not a controversy ordinarily cognizable by a Federal Court. Article III of the Constitution of the United States, which is the fountain of Federal Court jurisdiction, does not afford a suggestion of a justification for Federal jurisdiction of such controversy. This is not a controversy arising under the laws of the United States, for here no question as to the validity or effect of any law of the United States is in question. This Court has said in *Spencer* v. *Duplan Silk Co.*, 191 U. S. 526:

> "In the present case it is contended that the jurisdiction was not dependent entirely on the opposite parties to the suit being citizens of different States, because the suit arose under the laws of the United States, and that therefore jurisdiction rested also on that ground. But a suit does not so arise unless it actually and substantially involves a dispute or a controversy as to the effect or construction of the Constitution, or the validity or construction of the laws or treaties of the United States, upon the determination of which the result depends, and which appears in the record by the plaintiff's pleading."

No question of the validity or construction of Section 67, subdivision F or any other section of the Bankruptcy Act will arise between the parties hereto. It is purely a question of fact. The question between the parties, therefore, not being one naturally under the Constitution for Federal jurisdiction, remains—has Congress, pursuant to the authority granted to it by the Constitution to establish uniform laws on the subject of bankruptcies throughout the United States, specifically

granted the Federal Courts jurisdiction over controversies concerning the validity of a judgment under Section 67, subdivision F of the Bankruptcy Act? Unless there is such a specific grant of jurisdiction to the Federal Courts jurisdiction must remain in the State Courts where it naturally lies. The entire basis, therefore, of respondents' argument falls. The respondents argue (p. 22 of Respondents' Brief) that there must be specific evidence of the intention of Congress to deprive the Bankruptcy Court of jurisdiction before the jurisdiction of the State Court can be upheld. Quite the reverse would seem to be the situation. As we have seen, Congress has found it necessary to amend subdivision E in order to grant the Federal courts jurisdiction over cases arising under that subdivision and the very failure of Congress further to amend cannot but emphasize that there was no intention on the part of Congress to deprive judgment-creditors of the right to a plenary suit in the state court which has existed since the days of *Marshall* v. *Knox*, 16 Wall. 551.

It is a principle well recognized in this Court that the inferior Federal courts, being statutory in their origin, are limited in their jurisdiction to the class of cases in which jurisdiction is specifically conferred by statutory enactment.

One of the early cases upon this point to which, however, reference is even now frequently made, was the case of *The Mayor* v. *Cooper*, 6 Wall. 247, 252. There Mr. Justice Swayne said:

> "As regards all courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, whether original or appellate. The Constitution

> must have given to the court the capacity to take it, and an act of Congress must have supplied it. Their concurrence is necessary to vest it. It is the duty of Congress to act for that purpose up to the limits of the granted power. They may fall short of it, but cannot exceed it. To the extent that such action is not taken, the power lies dormant. It can be brought into activity in no other way."

This Court has but recently recognized the force of this view.

In the case of *Kline* v. *Burke Construction Company*, 260 U. S. 226, 234, Mr. Justice Sutherland used the following language:

> "Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution. *Turner* v. *Bank of North America*, 4 Dall. 8, 10; *United States* v. *Hudson & Goodwin*, 7 Cranch, 32; *Sheldon* v. *Sill*, 8 How. 441, 448; *Stevenson* v. *Fain*, 195 U. S. 165. The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. *The Mayor* v. *Cooper*, 6 Wall. 247, 252."

It follows from these authorities that there is no implied or residuary jurisdiction in the Federal courts. Specific enactment must be found in support of jurisdiction, or such jurisdiction does not exist. It follows, therefore, that the present

inquiry is not: Has Congress granted power to the State Courts to hear suits under Section 67F?, but rather: Has Congress empowered the Federal court, either sitting in bankruptcy, equity or law, to hear such controversies? It is confidently asserted that no such enactment of Congress can be found.

Certainly, in the general language of the Judicial Code, no such authority can be found, for the Judicial Code goes no further than to authorize the District Courts to take jurisdiction:

> "Sixth: Of all matters and proceedings in bankruptcy" (Judicial Code, Section 256).

It is not necessary extensively to quote from cases to this Court to demonstrate that the present is not a matter or proceeding in bankruptcy within the meaning of this Section of the Judicial Code.

> *Lathrop* v. *Drake,* 91 U. S. 516;
> *Babbitt* v. *Dutcher,* 216 U. S. 102;
> *Weidhorn* v. *Levy,* 253 U. S. 268;
> *Bardes* v. *Hawarden Bank,* 178 U. S. 524;
> *Kidder* v. *Horrobin,* 72 N. Y. 159.

The inquiry then must be prosecuted as to whether the Bankrupt Act itself specifically confers upon the Federal court jurisdiction to determine the validity or invalidity of a judgment lien under Section 67F of the Bankrupt Act. As has already been shown, the Bankrupt Act is silent as to that court which shall have jurisdiction over such controversies, and it therefore follows that a proceeding thereunder can only be maintained in the proper State Court.

The conclusion of the Respondents' brief (pp. 52-55 inclusive) constitutes an argument that the determination of this controversy should not go upon a strict question of jurisdiction but should rather be controlled by considerations of what the respondents deem to be convenience and expediency. To this view it seems impossible to subscribe. Congress from time to time, as we have seen, by proper amendment to the Bankruptcy Act, enlarges the jurisdiction of the Federal court, and Congress has not seen fit to recognize that as expedient or convenient, which the trustees consider expedient and convenient.

With regard to claims of title and with regard to pledges, the respondents recognize that a summary determination would be a serious curtailment of the rights of the claimant (pp. 39 and 43 of Respondents' brief). With regard to a Judgment-lien-claimant, however, the respondents do not seem to see any such serious curtailment. They do not see why the question of solvency as it arises between the Petitioner and the Respondents is one for a plenary suit (p. 54 of Respondents' brief). Yet it is the clear intention of Congress that suits to set aside preferences, which always involve the question of solvency, shall be the subject not of a summary determination but of a plenary suit—this by the specific provision of Section 23, subdivision B where reference to Section 60, subdivision B is specifically made, and Section 60, subdivision B is the section under which all suits to recover preferences are prosecuted.

In the instant case the respondents believe that this important question should be left to the Referee. This Court, as we have seen in the Peti-

tioner's principal brief (p. 27), in the case of *Weidhorn* v. *Levy*, 253 U. S. 268, said:

> "The provisions of the Act, as well as the title of his office, indicate that the Referee is to exercise powers not equal to or co-ordinate with those of the court or judge but subordinate thereto and he becomes the court only by virtue of the order of reference. In the General Orders the word 'proceedings' occurs frequently but never in a sense to include a plenary suit."

The error of entrusting to a Referee in Bankruptcy so important an issue could in no way be more clearly manifest than it has been in the present case. The respondents, quite off the record, at page 9 of their brief, have quoted from the language of the Referee in an opinion rendered by him almost on the very day when the writ of certiorari, pursuant to which the parties are now before the Court, was issued. If the Petitioner should descend to the practice of relying upon matters which are off the record demonstration would be simple that the Referee's determination referred to was only such as could be expected from such an official based on considerations entirely contrary to well defined principles of the law as announced by this Court and contrary to the evidence before him.

Miscellaneous Cases Relied Upon by Respondents Considered.

The principal case upon which the Respondents rely is *Clarke* v. *Larremore*, 188 U. S. 486. That case is treated by the Respondents (p. 24 *et seq.* of their brief) as standing for the propo-

sition practically that every judgment lien becomes null and void upon bankruptcy. *Clarke* v. *Larremore* stands for no such proposition. If the case did stand for such a proposition it would be clearly contrary to Section 67, subdivision F of the Bankruptcy Act, as that subdivision provides that only such judgment-liens shall be invalid in case the bankrupt was insolvent upon the date when the judgment was entered. The case of *Clarke* v. *Larremore* assumed and presupposed the insolvency of the judgment-debtor upon the date when the judgment was entered and indeed no contention was raised that the judgment-debtor was solvent on that date. The question before the Court in *Clarke* v. *Larremore* was only this—when a Sheriff has sold property levied upon and holds the proceeds pending a return of the execution, are the moneys in his hands the moneys of the judgment-creditor so that the Bankruptcy Court cannot reach them in the hands of the Sheriff? No question of the validity or invalidity of the judgment was considered. The invalidity was indeed assumed. The judgment-creditor sought to hold on to the moneys in the hands of the Sheriff only upon the ground that, whether or not the judgment were invalid, the property having been sold and the Sheriff holding the money, he was entitled to that money as against the trustee in bankruptcy. The question as to what forum would have jurisdiction to pass upon the validity or invalidity of the judgment based upon insolvency or solvency was not even argued. That point is clearly set out in the language of Judge Lacombe in his concurring opinion in the *Matter of Andre*, 135 Fed. 736, referred to

at page 39 of Petitioner's principal brief. Referring to this case, he says:

> "It was taken by certiorari to the Supreme Court, but in none of the four briefs there filed (two by each side) is there any discussion as to the jurisdiction of a Bankruptcy Court to make a summary order directing the transfer of property in the possession of a person holding an adverse claim."

That such is the effect of *Clarke* v. *Larremore*, was further recongized by the Circuit Court of Appeals of the Eighth Circuit in *Stone* v. *Mark*, 227 Fed. 975, 978, where the Court said:

> "* * * No issue of the insolvency of the Cracker Company was ever tendered * * * and as the burden was on the trustee to plead and prove the insolvency of the Cracker Company in order to bring his case under Section 67F, the order directing the Stone Company to pay over the moneys rests on the presumption that the Cracker Company was solvent when the Stone Company obtained its lien, and Section 67 F and the authorities under it have no relevancy to the questions arising in this case. They must accordingly be laid aside, including *Clarke* v. *Larremore*, 188 U. S. 486, in which counsel for the trustee seems to place much faith, but which rests on an adjudication of bankruptcy in a contested case, on the ground that the lien annulled in that case was acquired while the bankrupt was insolvent and that it constituted the act of bankruptcy."

Inasmuch as the question of jurisdiction was not considered by this Court in *Clarke* v. *Larremore*, that case can not be considered an authority on that subject (*Tefft* v. *Munsuri*, 222 U. S. 114).

In passing, it should be called to the Court's attention that the Respondents (p. 45 of Respondents' Brief) have sought in a manner to discredit the decision of this Court in *First National Bank of Chicago* v. *Chicago Trust Co.*, 198 U. S. 280, for the reason that it was not cited by this Court in *Clarke* v. *Larremore*, 188 U. S. 486. Obviously the later case could not be cited in the earlier.

The Respondents also cite the case of *In re Ransford*, 194 Fed. 658 (p. 28 of Respondents' Brief). This case lends no support to the Respondents' position. In that case the judgment-creditor had obtained a judgment against the debtor's bank in garnishment proceedings. The judgment-creditor contended that by virtue of the garnishment he became a direct creditor of the bank and entitled to the deposits theretofore kept in the bank by the bankrupt by reason of a novation created by operation of the law. The Court devoted its attention almost exclusively to this point and determined that as a matter of State law such novation was not created by operation of law. It was nowhere intimated, much less contended, that the bankrupt was solvent on the date of the garnishment judgment. The Court disposed of the claim of adverse possession entirely upon the proposition that a garnishment lien is *ipso facto* void by bankruptcy. The questions here involved were not before the Court.

Nor is the case of *Staunton* v. *Wooden*, 179 Fed. 61 (Respondents' Brief, p. 29), an authority in favor of respondents. In this case the Court dealt with an *attachment* which had been levied prior to the filing of the petition in bankruptcy and an execution which was not levied until after the filing of the petition in bankruptcy. Here, too, the bankruptcy was involuntary. The

contention that the bankrupt was solvent at the date when the attachment was levied was not even raised. Besides, when the Petitioner denied the jurisdiction of the Referee to entertain a summary proceeding, he raised no objections which would indicate that he interposed an adverse claim.

The Respondents also (page 32 of Respondents' Brief) cite the case of *Orr* v. *Tribble*, 158 Fed. 897; *in re Knight*, 125 Fed. 35; *in re Southern Arizona Smelting Co.*, 231 Fed. 87. No quotation from these cases appears in the respondents' brief. A careful reading of these cases reveals no possible reason why any reference thereto should have been made to them. The other cases, which are referred to in the respondents' brief, have been considered under the earlier heads of this brief.

CONCLUSION.

For the reasons set forth in the Petitioner's principal brief, the decree of the Circuit Court of Appeals should be reversed. The contentions raised by the Respondents, it is believed, this Court will find without basis in authority or reason. The petitioner comes before this Court asserting a fundamental right depending upon questions of jurisdiction and due process of law. Its right is substantial. If, as argued by the respondents, there is even a greater diversity in the holding of the various Circuits than that which was indicated in the Petitioner's application for certiorari the stronger reason exists for the establishment in this case of a rule of universal application based upon the statutory

powers granted or withheld in the Acts of Congress entirely divorced from any considerations which any of the parties to the litigation may entertain as to convenience or expediency in this particular case.

The Petitioner, therefore, respectfully submits that the decree of the Circuit Court of Appeals should be reversed and the order of the District Court affirmed.

Respectfully submitted,

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TAUBEL-SCOTT-KITZMILLER COMPANY, INC. *v.* FOX, ET AL., TRUSTEES IN BANKRUPTCY OF COWEN HOSIERY COMPANY, INC., BANKRUPT.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 188. Argued January 22, 23, 1924.—Decided April 7, 1924.

1. Section 67f of the Bankruptcy Act does not invalidate a lien obtained by levy of an execution within the four months preceding the filing of the petition in bankruptcy on which the judgment debtor is adjudged a bankrupt, if the debtor was in fact solvent when the levy was made. P. 429.
2. Congress has power to confer upon the bankruptcy court jurisdiction to adjudicate the rights of trustees in bankruptcy to property adversely claimed, even when not in the possession of the bankruptcy court, and may determine to what extent jurisdiction shall

be exercised by summary proceedings and to what extent by plenary suit. Pp. 430, 438.

3. But the bankruptcy court has not been given jurisdiction by summary proceedings or otherwise to avoid, under § 67f, a lien created by levy of an execution under a judgment of a state court within four months preceding the filing of the petition in bankruptcy, where the property is in the actual possession of the sheriff and neither he nor the judgment creditor has appeared in or consented to adjudication by the bankruptcy court, and where the claim of the creditor that the bankrupt was not insolvent at the time of judgment and levy is not colorable but substantially supported. *Id.*

4. Section 67f, in providing that the bankruptcy court may order that a lien void as against the trustee shall be preserved for the benefit of the estate, does not confer, by implication, jurisdiction to determine whether the lien is void, but grants substantive rights effected by means of subrogation. P. 435.

286 Fed. 351, reversed.

CERTIORARI to a judgment of the Circuit Court of Appeals reversing, on petition to revise, an order of the District Court, in bankruptcy, which stayed a summary proceeding before the referee brought by trustees in bankruptcy for the purpose of having an execution declared void and to obtain possession of property upon which it had been levied.

Mr. Elkan Turk, with whom *Mr. Frank J. Hogan*, *Mr. Herman Goldman* and *Mr. Harry G. Liese* were on the brief, for petitioner.

Mr. David W. Kahn for respondents.

Mr. JUSTICE BRANDEIS delivered the opinion of the Court.

Taubel-Scott-Kitzmiller Co., Inc., recovered, in the Supreme Court of the State of New York, a judgment against Cowen Hosiery Co., Inc. Execution thereon was levied upon personal property of the defendant lying upon

premises occupied by it. The levy created a lien upon the property. New York Civil Practice Act, § 679. The sheriff took, and thereafter retained, exclusive possession and control of the property. Within four months of the date of the levy, the Cowen Co. filed, in the Southern District of New York, a voluntary petition in bankruptcy and was adjudged a bankrupt. Relying upon subdivision f * of § 67 of the Bankruptcy Act, the trustees sought, by a summary proceeding before the referee, to have the lien on execution declared void and to obtain possession of the property. The referee ordered that the judgment creditor show cause before him why this should not be done. Before the District Court, the judgment creditor seasonably challenged the jurisdiction of the referee and of the bankruptcy court; furnished substantial support for its claim that the debtor was solvent at the date of the entry of judgment and levy of execution thereon; and insisted that, since the bankrupt did not have, and the bankruptcy court did not acquire, possession of the property, the execution lien and the right to possession under

* "f. That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a *bona fide* purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

the levy could not be assailed by the trustees except by a plenary suit in the appropriate forum. The trustees, on the other hand, urged that the referee had jurisdiction, even if the adverse claim by the judgment creditor be deemed a substantial one. The District Court sustained the contention of the judgment creditor and stayed the proceeding before the referee. Upon a petition to revise, its order was reversed by the Circuit Court of Appeals. 286 Fed. 351. The case is here on writ of certiorari. 260 U. S. 719.

A trustee seeking to have declared void, under subdivision f of § 67, a lien obtained through legal proceedings, and to recover possession of property, may be confronted with an adverse claim upon several grounds. It may be asserted that the lien attacked is of a character different from those provided for in that subdivision.[1] Or, although the lien (*e. g.*, that obtained by levy of execution) is clearly one to which subdivision f applies, that it is valid by reason of other facts. For the statute does not, as a matter of substantive law, declare void every lien obtained through legal proceedings within four months of the filing of the petition in bankruptcy. The lien may be valid, because the debtor was, in fact, solvent at the time the levy was made.[2] Or, although the debtor

[1] *Henderson* v. *Mayer*, 225 U. S. 631. Compare *City of Richmond* v. *Bird*, 249 U. S. 174, 175; *In re Emslie*, 102 Fed. 291; *In re Lillington Lumber Co.*, 132 Fed. 886; *In re Robinson & Smith*, 154 Fed. 343; *Kemp Lumber Co.* v. *Howard*, 237 Fed. 574, 577; *American Trust & Savings Bank* v. *Ruppe*, 237 Fed. 581.

[2] See *Simpson* v. *Van Etten*, 108 Fed. 199, 201; *Stone-Ordean-Wells Co.* v. *Mark*, 227 Fed. 975, 977; *Martin* v. *Oliver*, 260 Fed. 89, 93; *In re Community Stores*, 282 Fed. 328, 329. Cases like *Cook* v. *Robinson*, 194 Fed. 785, 792, and *In re Southern Arizona Smelting Co.*, 231 Fed. 87, 92, to the contrary, are not consistent with the express words of the act. In *Clarke* v. *Larremore*, 188 U. S. 486, it appeared (see original papers) that there was no contention that the bankrupt was solvent at the time of the levy. In *Hutchinson* v. *Otis*,

was then insolvent, because the property had passed into the hands of a *bona fide* purchaser.[3] Or, although the debtor was then insolvent and the levy was made within the four months, because inchoate rights by way of lien had been acquired earlier.[4] As the establishment of any one of these facts would bar recovery by the trustee, their assertion presents a judicial question. In this case, since the possession of the sheriff was the possession of the state court, the trustees' claim to the property would, under general principles of law, have to be litigated in the state court.[5] The question for decision is: Has Congress conferred upon the bankruptcy court, under these circumstances, jurisdiction to adjudicate the controverted rights by summary proceedings?

Congress has, of course, power to confer upon the bankruptcy court jurisdiction to adjudicate the rights of trustees to property adversely claimed. In matters relating to bankruptcy its power is paramount.[6] Hence, even if the property is not within the possession of the bankruptcy court, Congress can confer upon it, as upon any other lower federal court, jurisdiction of the controversy, by conferring jurisdiction over the person in

190 U. S. 552, it was agreed (see original papers) that the debtor was insolvent at the date of the attachment. In *Chicago, Burlington & Quincy R. R. Co.* v. *Hall*, 229 U. S. 511, 514, it is found that the debtor was insolvent at the time of the garnishment. See *In re Ann Arbor Machine Co.*, 278 Fed. 749, 752. As against an adverse claimant, the mere adjudication of bankruptcy does not, even in involuntary proceedings, conclusively establish insolvency at the date of the attachment or levy. Compare *Gratiot State Bank* v. *Johnson*, 249 U. S. 246.

[3] *Jones* v. *Springer*, 226 U. S. 148.

[4] *Metcalf* v. *Barker*, 187 U. S. 165; *Pickens* v. *Roy*, 187 U. S. 177.

[5] *Taylor* v. *Carryl*, 20 How. 583, 595; *Covell* v. *Heyman*, 111 U. S. 176, 179. Compare *Lion Bonding & Surety Co.* v. *Karatz*, 262 U. S. 77, 88–90.

[6] *In re Watts & Sachs*, 190 U. S. 1, 27; *Robertson* v. *Howard*, 229 U. S. 254.

whose possession the property is. Congress has, also (subject to the constitutional guaranties), power to determine to what extent jurisdiction conferred, whether through possession of the *res* or otherwise, shall be exercised by summary proceedings and to what extent by plenary suit.[7] But Congress did not, either by § 2, § 23 of the Bankruptcy Act of 1898 or any other provision of the act, confer generally such broad jurisdiction over claims by a trustee against third persons.[8] Nor has it provided, in terms, that a substantial adverse claim to property which is not in the possession of the bankruptcy court and which is demanded by the trustee under subdivision f of § 67, may be litigated, without consent, by a summary proceeding. To sustain the judgment under review, a specific grant of power to so deal with such a controversy must be shown. The contention is that a specific grant of the power is implied in a clause contained in subdivision f. Before examining the clause, it will be helpful to consider the rules, established by decisions of this Court, governing like proceedings under provisions of the Bankruptcy Act cognate to subdivision f of § 67.

The Bankruptcy Act provides in subdivision e of § 67, in subdivision b of § 60 and in subdivision e of § 70, for the recovery by the trustee of property formerly belong-

[7] It has not done so in terms. In the absence of congressional definition of the scope of summary proceedings, it has been determined by decisions of this Court and the General Orders in Bankruptcy. The bankruptcy court may deal by summary proceeding with property in its possession in all matters administrative in their nature; and also with all matters judicial in their nature, to the extent commonly practiced in courts of equity. See *United States Fidelity & Guaranty Co.* v. *Bray*, 225 U. S. 205, 217; *Robertson* v. *Howard*, 229 U. S. 254, 260.

[8] *Harris* v. *First National Bank*, 216 U. S. 382; *Park* v. *Cameron*, 237 U. S. 616; *Kelley* v. *Gill*, 245 U. S. 116. Compare *Lovell* v. *Newman & Son*, 227 U. S. 412.

ing to the bankrupt and which, within four months of the commencement of the proceedings in bankruptcy, had been subjected, in some manner, to a lien. The substantive rights of the trustee under these provisions differ according to the nature of the lien or of the infirmity therein. Under subdivision e of § 67, where the lien was created *in pais*, it is voidable if it was made, within the four months, with the intent to hinder and defraud creditors, or if, within that period, it was made while insolvent under such circumstances that, under the laws of the State where the property is situated, it is void as to creditors. Under subdivision b of § 60, the lien is voidable, whether it was created *in pais* or through legal proceedings, if it was created within the four months while the debtor was insolvent and the effect of its enforcement would be to give a preference. Under subdivision e of § 70 a lien, however created, although not within the four months, is voidable by the trustee, if any creditor of the bankrupt might have avoided it. But the adjective rights of the trustee to litigate in the bankruptcy court claims incident to the lien were the same under these differing provisions.

By the Act of 1898, as originally enacted, the power of the bankruptcy court to adjudicate, without consent, controversies concerning the title, arising under either § 67 e or § 60 b, or § 70 e, was confined to property of which it had possession. The possession, which was thus essential to jurisdiction, need not be actual. Constructive possession is sufficient. It exists where the property was in the physical possession of the debtor at the time of the filing of the petition in bankruptcy, but was not delivered by him to the trustee;[9] where the property was delivered to the trustee, but was thereafter wrongfully withdrawn from

[9] *Page* v. *Edmunds*, 187 U. S. 596.

his custody;[10] where the property is in the hands of the bankrupt's agent or bailee;[11] where the property is held by some other person who makes no claim to it;[12] and where the property is held by one who makes a claim, but the claim is colorable only.[13] As every court must have power to determine, in the first instance, whether it has jurisdiction to proceed, the bankruptcy court has, in every case, jurisdiction to determine whether it has possession actual or constructive.[14] It may conclude, where it lacks actual possession, that the physical possession held by some other persons is of such a nature that the property is constructively within the possession of the court.[15]

Wherever the bankruptcy court had possession, it could, under the Act of 1898, as originally enacted, and can now, determine in a summary proceeding controversies involving substantial adverse claims of title under subdivision e of § 67, under subdivision b of § 60 and under subdivision e of § 70.[16] But in no case where it lacked possession,

[10] *White* v. *Schloerb*, 178 U. S. 542; *Fairbanks Shovel Co.* v. *Wills*, 240 U. S. 642. Compare *Pirie* v. *Chicago Title & Trust Co.*, 182 U. S. 438, 442, 445; *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U. S. 300, 307.

[11] *Mueller* v. *Nugent*, 184 U. S. 1, 15.

[12] *Babbitt* v. *Dutcher*, 216 U. S. 102, 105.

[13] Compare *In re Weinger, Bergman & Co.*, 126 Fed. 875; *In re Rudnick & Co.*, 158 Fed. 223; *In re Ransford*, 194 Fed. 658, 663; *In re Columbia Shoe Co.*, 289 Fed. 465.

[14] *Hebert* v. *Crawford*, 228 U. S. 204. Compare *Noble* v. *Union River Logging R. R. Co.*, 147 U. S. 165, 173; *Schweer* v. *Brown*, 195 U. S. 171; *In re Kramer*, 218 Fed. 138, 141.

[15] *In re Weinger, Bergman & Co.*, 126 Fed. 875; *In re Eddy*, 279 Fed. 919. Compare *In re Rockford Produce & Sales Co.*, 275 Fed. 811. Also *In re Yorkville Coal Co.*, 211 Fed. 619; *In re Goldstein*, 216 Fed. 887; *In re Goldstein* v. *Central Trust Co.*, 216 Fed. 889.

[16] *Murphy* v. *John Hofman Co.*, 211 U. S. 562, 569; *Hebert* v. *Crawford*, 228 U. S. 204; *Weidhorn* v. *Levy*, 253 U. S. 268, 271, 272; *Board of Trade of Chicago* v. *Johnson*, *ante*, 1. Compare *Whitney* v. *Wenman*, 198 U. S. 539, 553; *Matter of Loving*, 224 U. S. 183; *Houghton* v. *Burden*, 228 U. S. 161; *Lazarus* v. *Prentice*, 234 U. S. 263.

could the bankruptcy court, under the law as originally enacted, nor can it now (without consent) adjudicate in a summary proceeding the validity of a substantial adverse claim.[17] In the absence of possession, there was under the Bankruptcy Act of 1898, as originally passed, no jurisdiction, without consent, to adjudicate the controversy even by a plenary suit.[18] The Act of February 5, 1903, c. 487, § 8, 32 Stat. 797, 798, 800, together with the Act of June 25, 1910, c. 412, § 7, 36 Stat. 838, 840, conferred upon the bankruptcy court jurisdiction, under certain circumstances, against the adverse claimant, in a plenary suit under § 60, subdivision b, § 67, subdivision e, and § 70, subdivision e. But no amendment has conferred upon the bankruptcy court jurisdiction, even in a plenary suit, of proceedings under subdivision f of § 67.

The controversy presented when a trustee proceeding under subdivision f of § 67 is confronted with a substantial adverse claim to property not in his possession, does not differ in character from that presented by like proceedings under the other sections discussed. No reason is suggested why the Act of 1898 should have granted to the bankruptcy court jurisdiction in cases arising under § 67, subdivision f, while it did not in like cases arising under these other provisions. Nor is any reason suggested why Congress should have granted by that act power to adjudicate the controversy arising under subdivision f of § 67 in

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[17] *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18; *Jaquith* v. *Rowley*, 188 U. S. 620; *First National Bank* v. *Chicago Title & Trust Co.*, 198 U. S. 280, 289; *Galbraith* v. *Vallely*, 256 U. S. 46. In *Bryan* v. *Bernheimer*, 181 U. S. 188, 197, there was consent to the jurisdiction.

[18] *Bardes* v. *Hawarden Bank*, 178 U. S. 524; *Mitchell* v. *McClure*, 178 U. S. 539; *Wall* v. *Cox*, 181 U. S. 244; *Frank* v. *Vollkommer*, 205 U. S. 521; *Wood* v. *Wilbert's Sons Co.*, 226 U. S. 384, 389. Compare *Hicks* v. *Knost*, 178 U. S. 541; *Bush* v. *Elliott*, 202 U. S. 477; *Lovell* v. *Newman & Son*, 227 U. S. 412; *Collett* v. *Adams*, 249 U. S. 545; *Flanders* v. *Coleman*, 250 U. S. 223.

a summary proceeding, while it has never permitted a like controversy arising under any of the other provisions discussed above to be dealt with otherwise than in a plenary suit.[19]

The contention that Congress did confer upon the bankruptcy court the exceptional jurisdiction to determine in a summary proceeding substantial adverse claims arising under subdivision f, concerning the title and possession of property not in its possession, rests wholly on the following clause of that subdivision:

"the property affected by the levy [held void] . . . shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy . . . shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect."

The argument is that, since the bankruptcy court is expressly empowered to order that a lien void as against the trustee shall be preserved for the benefit of the estate, it was given, by implication, jurisdiction to determine whether the lien is void. The argument proceeds upon a misapprehension of the nature and purpose of the clause in question. It does not confer jurisdiction. It confers substantive and adjective rights. Its grant of substantive rights, effected by means of subrogation, is a grant of property interests which the bankrupt did not own at the

[19] The Act of 1841 was said, in *Ex parte Christy*, 3 How. 292, 312, to have conferred upon the bankruptcy court jurisdiction over adverse claims, although the property was not in its possession; and it was also said, that this jurisdiction might be exercised by summary proceeding. But see *Bardes* v. *Hawarden Bank*, 178 U. S. 524, 533, 534. The Act of 1867 conferred the jurisdiction upon the federal district and circuit courts; but required that the jurisdiction be exercised in a plenary suit. *Smith* v. *Mason*, 14 Wall. 419; *Marshall* v. *Knox*, 16 Wall. 551; *Lathrop* v. *Drake*, 91 U. S. 516.

time of filing the petition.[20] Thus, an execution lien upon property, owned by the debtor at the time of the levy and good as against a subsequent purchaser but void as against the trustee under subdivision f, may be preserved for the benefit of the estate. If the lien were not so preserved, the benefit resulting from nullifying it would enure to the purchaser. Subrogation is the process by which this substantive right is made available.[21] Where the bankrupt remained owner of the property until the commencement of the bankruptcy proceedings and the void lien remained the only encumbrance on the property, there is no need of preserving it. But in such a case it may be desirable to invoke the strictly adjective powers conferred by the clause, and to apply for an order that a release or conveyance be made so as to remove a cloud upon title.[22]

The substantive right of subrogation which the clause confers can come into effect only after the invalidity of the lien as against the trustee has been established either by an admission of the holder of the lien or by an adjudication. It is entirely immaterial, so far as concerns the enjoyment of the right of subrogation, in which of

[20] *First National Bank* v. *Staake*, 202 U. S. 141, 148; *McHarg* v. *Staake*, 202 U. S. 150. Compare *In re Hammond*, 98 Fed. 845.

[21] The void lien is not preserved for the estate unless the trustee requests that it be done. See *Goodnough Mercantile & Stock Co.* v. *Galloway*, 171 Fed. 940; *In re Walsh Bros.*, 195 Fed. 576; *In re Prentice*, 267 Fed. 1019, 1020. Compare *Thompson* v. *Fairbanks*, 196 U. S. 516, 527, 528; *Duffy* v. *Charak*, 236 U. S. 97, 100. The occasion for seeking subrogation under this clause of § 67, subdivision f, has been lessened by the amendment to § 47, clause 2, of subdivision a of the Act of June 25, 1910, c. 412, § 8, 36 Stat. 838, 840, by which a trustee in bankruptcy "as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings." Compare *Bailey* v. *Baker Ice Machine Co.*, 239 U. S. 268, 276.

[22] Compare *Chapman* v. *Brewer*, 114 U. S. 158, 170, 171; *De Friece* v. *Bryant*, 232 Fed. 233, 239.

these ways the invalidity is established. It is entirely immaterial, where it is established by an adjudication, whether it be that of a state court, the bankruptcy court or of the federal district court sitting at law or equity. In every case in this Court in which this right to subrogation has been exercised (and in most cases in the lower courts),[23] following an adjudication of invalidity made by the bankruptcy court, there had been either consent that jurisdiction be taken for that purpose [24] or there was possession of the *res* by that court.[25]

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[23] Invalidity was admitted in *First National Bank* v. *Staake*, 202 U. S. 141, 143; in *Rock Island Plow Co.* v. *Reardon*, 222 U. S. 354, 356; and in *Fallows* v. *Continental Savings Bank*, 235 U. S. 300 (see original papers). Compare *Miller* v. *New Orleans Fertilizer Co.*, 211 U. S. 496. It was admitted or assumed in *In re Alabama Coal & Coke Co.*, 210 Fed. 940, 942; *Bell* v. *Frederick*, 282 Fed. 232, 233. Compare *In re Francis-Valentine Co.*, 93 Fed. 953, 954; *In re Hammond*, 98 Fed. 845, 859; *Bear* v. *Chase*, 99 Fed. 920, 924; *In re Lesser*, 100 Fed. 433, 438; *In re Kemp*, 101 Fed. 689, 690; *In re Breslauer*, 121 Fed. 910, 913, 914; *In re Petersen*, 200 Fed. 739, 741; *In re Obergfoll*, 239 Fed. 850; *In re Community Stores*, 282 Fed. 328; *In re Chebot*, 288 Fed. 1006.

[24] Objections to the jurisdiction of the bankruptcy court were at first raised, but later withdrawn, and express consent given, in *Clarke* v. *Larremore*, 188 U. S. 486 (as the original papers disclose); *First National Bank* v. *Staake*, 202 U. S. 141 (see 126 Fed. 845, 846); *Rock Island Plow Co.* v. *Reardon* 222 U. S. 354, 356; *Globe Bank & Trust Co.* v. *Martin*, 236 U. S. 288, 293. Also *In re Porterfield*, 138 Fed. 192, 197. In other cases, the objection to the jurisdiction was waived, or the existence of jurisdiction was assumed. See *In re Beals*, 116 Fed. 530, 534; *In re Southern Arizona Smelting Co.*, 231 Fed. 87, 89; *Jones* v. *Ford*, 254 Fed. 645, 646; *In re Dukes*, 276 Fed. 724; *In re Ann Arbor Machine Co.*, 278 Fed. 749, 751. Compare *Knapp* v. *Milwaukee Trust Co.*, 216 U. S. 545, 552. Also *Wells & Co.* v. *Sharp*, 208 Fed. 393, 396; *In re Brantman*, 244 Fed. 101, 104; *In re Rockford Produce & Sales Co.*, 275 Fed. 811, 814.

[25] The property was in the actual possession of the bankruptcy court at the time of the adjudication of the adverse claim in *Fallows* v. *Continental Savings Bank*, 235 U. S. 300, 303, 304. Also

In this case, the sheriff had, before the filing of the petition in bankruptcy, taken exclusive possession and control of the property; and he had retained such possession and control after adjudication and the appointment of the trustees.[26] The bankruptcy court, therefore, did not have actual possession of the *res*. The adverse claim of the judgment creditor was a substantial one. The bankruptcy court, therefore, did not have constructive possession of the *res*. Neither the judgment creditor, nor the sheriff, had become a party to the bankruptcy proceedings.[27] There was no consent to the adjudication by the bankruptcy court of the adverse claim. The objection to the jurisdiction was seasonably made and was insisted upon throughout. The bankruptcy court, therefore, did not acquire jurisdiction over the controversy in summary proceedings. Nor did it otherwise.

Reversed.

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in *In re Fitzhugh Hall Amusement Co.*, 228 Fed. 169, 171; 230 Fed. 811. Compare *Henderson* v. *Mayer*, 225 U. S. 631, 632. In some other cases where subrogation was ordered, the bankruptcy court was deemed to have constructive possession, because the claim of the person in actual possession was held to be colorable. See *In re Weinger, Bergman & Co.*, 126 Fed. 875; *In re Graessler & Reichwald*, 154 Fed. 478.

[26] The fact that the property remained on premises formerly occupied by the bankrupt is, of course, immaterial. Compare *Duffy* v. *Charak*, 236 U. S. 97, 98; *In re Rhoads*, 98 Fed. 399, 400.

[27] Compare *Gratiot State Bank* v. *Johnson*, 249 U. S. 246, 249.